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SUPREME COURT, U.S.

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1976

WILLIE LEE BELL,

Petitioner

-vs-

THE STATE OF OHIO,

Respondent

NO.

76-6519

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PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

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CONSTITUTIONAL AND STATUTORY AUTHORITY:

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IN THE
 SUPREME COURT OF THE UNITED STATES
 October Term, 1976

WILLIE LEE BELL,
 Petitioner
 -vs-
 THE STATE OF OHIO,
 Respondent

NO.

* * * * *

PETITION

Willie Lee Bell, Petitioner herein, respectfully represents to the Court that he was convicted of the crime of aggravated murder, kidnapping and aggravated robbery in the Court of Common Pleas of Hamilton County, Ohio, and has been sentenced to death. His conviction and sentence were affirmed by the Court of Appeals for the First Appellate District, Hamilton County, Ohio, and the Ohio Supreme Court affirmed the conviction and sentence on December 22, 1976. Petitioner's motion for a rehearing in the Ohio Supreme Court was denied on January 14, 1977, and execution of the sentence of death was stayed pending the final disposition of the within appeal to this Court; Petitioner respectfully prays that a writ of certiorari issue to review the decision of the Supreme Court of Ohio affirming Petitioner's conviction and sentence.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio, entered December 22, 1976, is reported at 48 Ohio St.2d 270, 358 NE2d 556, and is reproduced herein as Appendix A. The opinion of the Court of Appeals for the First Appellate District, not yet reported, is reproduced herein as Appendix B.

JURISDICTION

The final order of the Supreme Court of Ohio denying Petitioner's appeal was entered January 14, 1977. This Petition is filed within the time required, and jurisdiction of this Court is founded upon 28 USC § 1257 (3)(1970), the Petitioner having asserted below and in this Court a denial of rights secured to him by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY

PROVISIONS INVOLVED

This case involves certain provisions of the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States, and the Ohio state statutory provisions governing the infliction of the penalty of death.

A. THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

In pertinent part, the Fifth amendment provides:

No person . . . shall be compelled in any criminal case to be a witness against himself.

B. THE SIXTH AMENDMENT TO THE CONSTITUTION:

In pertinent part, the Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by . . . jury . . . and to the Assistance of counsel for his defense.

C. THE EIGHTH AMENDMENT TO THE CONSTITUTION:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

D. THE FOURTEENTH AMENDMENT TO THE CONSTITUTION:

In pertinent part, the Fourteenth Amendment provides:

. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

E. THE OHIO AGGRAVATED MURDER STATUTES:

§ 2903.01 R.C. Aggravated Murder.

. . . .

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

§ 2929.02 Penalties for Murder.

(A) Whoever is convicted of aggravated murder in violation of § 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.03 and 2929.04 of the Revised Code. In addition the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

. . . .

§ 2929.03 Imposing sentence for a capital offense:

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in Division (A) of section 2929.04 of the revised code, . . . then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

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(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury.

(2) By the trial judge, if the offender was tried by jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel, the court shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges *unanimously* finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the revised code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender. [Italics added]

§2929.04 Criteria for imposing death or imprisonment for a capital offense.

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the revised code, and is proved beyond a reasonable doubt:

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and

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condition of the offender, one or more of the following is established by a preponderance of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

[Irrelevant portions of the foregoing Ohio statutes have been omitted to facilitate the understanding of the statutory scheme as it involves Petitioner's situation.]

QUESTIONS PRESENTED

1. CONSTITUTIONALITY OF THE OHIO DEATH PENALTY:

Whether the imposition of the sentence of death for the crime of aggravated murder under the laws of the State of Ohio (effective January 1, 1974) violates the protection against cruel and unusual punishment secured to all persons by the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. COERCION OF ACCUSED TO WAIVE RIGHT TO TRIAL BY JURY:

Whether the Ohio statutory scheme for the imposition of the death penalty unconstitutionally coerced Petitioner, and tends to coerce other defendants similarly situated, into waiving the right to trial by jury guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States.

3. RIGHT OF MINOR TO HAVE MIRANDA WARNING ADDRESSED TO PARENT OR ADULT ADVISOR PRIOR TO THE TAKING OF A STATEMENT:

Whether a confession by a juvenile 16 years of age

may be used at trial against him where, although he had been given his Miranda warnings, his parents or an adult "next friend" were not given such warnings, and he and his parents or an adult friend were not permitted to confer and to consider whether he should waive his Fifth Amendment right against self-incrimination and his Sixth Amendment right to counsel, before submitting to custodial interrogation by law enforcement authorities.

On this question, two adjacent sister states, Ohio and Indiana, have reached contrary interpretations of the rights of a juvenile accused of murder under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. State v. Bell, 48 Ohio St.2d 270 [The instant case], and Lewis v. State, Ind., 288 NE2d 138.

4. VOLUNTARINESS OF CONFESSION GIVEN BY A JUVENILE WITHOUT NOTICE OF THE POSSIBILITY OF THE DEATH PENALTY, OR THAT THE JUVENILE SUSPECT MIGHT LOSE THE PROTECTION OF THE JUVENILE COURT SYSTEM.

Whether a statement given by a 16 year old suspect, with an estimated IQ of 90, and with a psychiatrically-diagnosed "moderately diminished capacity" to understand the seriousness of his predicament, is truly voluntary where neither he nor his parents had been advised prior to the interrogation that the result of his statement might be the loss of the protection of the juvenile court, and his eventual indictment, trial, conviction and electrocution as an adult.

[Argument presented with argument on Question # 3.]

STATEMENT OF THE CASE

On the evening of October 16, 1974, Petitioner, Willie Lee Bell, then 16 years of age, was a passenger in an auto driven by one Samuel Hall, then 18. Hall followed a Chevelle auto into the parking garage at the Park Lane Apartments in Cincinnati, Hamilton County, Ohio, and forced the driver, Mr. Julius Graber, into the trunk of his own car at the point of a sawed-off shotgun. Hall drove the Chevelle to his home, Petitioner following in the auto the two had been in prior to the garage incident, which auto was owned by Hall's brother. After parking his brother's auto, Hall returned to Mr. Graber's Chevelle and instructed Petitioner to drive. Following Hall's directions, Petitioner drove the auto until they passed a dark service road in Spring Grove Cemetery. At Hall's command, Petitioner backed the car up the service road.

Hall removed Mr. Graber from the trunk and marched him at gunpoint up the service road. Petitioner remained at the auto. Hall shot Mr. Graber once, grazing his cheek, and ran back to the car where he reloaded the single-shot weapon. Hall then ran back into the darkness and executed Mr. Graber by placing the barrel against the hands Mr. Graber had clasped behind his head and pulling the trigger. Petitioner did not participate in the killing, and in fact did not know that Hall intended to kill Mr. Graber when the two went up the service road.

Hall then drove himself and Petitioner to Dayton, Ohio where they spent the night. The next day Hall was arrested by

an Ohio state policeman while driving a car he had stolen at gunpoint, with the owner of the auto in the truck. Petitioner, following Hall in Mr. Graber's Chevelle, continued past the arrested Hall and returned to Cincinnati, abandoning the car in the garage of an abandoned apartment house a block from his home.

A week or so later, Petitioner accompanied Cincinnati police officers to headquarters to answer questions about Samuel Hall. At some point it became apparent that Petitioner was a suspect in the Graber slaying, and Petitioner was given his Miranda rights and made several admissions, finally agreeing to give police a recorded statement. Before he gave the statement, police called Petitioner's mother and advised her that he was to be charged in Juvenile Court in a "homicide and kidnapping," and that he was about to give a statement. Mrs. Bell was afforded the opportunity to be present, but was also told that her son did not want her present. Accordingly, she declined the "invitation." She was admittedly not advised of her son's Miranda rights, and neither Petitioner nor his mother were advised that the Juvenile Court had the power to waive jurisdiction and that he could be tried as an adult. Neither was told that the statement he was about to give could be used by the State in an attempt to secure his death in the electric chair. Ignorant of these two crucial facts, Petitioner gave a statement admitting the facts set forth herein, denying that he had seen the shotgun before Hall pulled it on Mr. Graber, and denying any intent to kill on his part and denying that he

had participated in the actual killing. The last Petitioner had seen of Mr. Graber, he had been alive and well, preceding Hall up the dark path of the service road while Petitioner remained at the car.

Charges were filed in the Juvenile Division of the Court of Common Pleas, which waived jurisdiction, and Petitioner was jointly indicted with Hall in a four count indictment charging the two with two counts of aggravated murder, and one count of kidnapping and aggravated robbery. Two specifications of aggravating circumstances were also included in the indictment.

Petitioner pleaded not guilty and not guilty by reason of insanity, and filed a motion to suppress his statement from evidence. The trial court appointed three psychiatrists to evaluate Petitioner and report to the Court regarding his present ability to assist counsel and to stand trial. Petitioner was found then to be sane on the basis of the testimony of the three psychiatrists; that while there had been considerable recent drug involvement, Petitioner had an IQ of approximately 90, and suffered from a moderately diminished capacity to understand the seriousness of his situation, he was sane enough to stand trial.

At the hearing on the motion to suppress the statement, Petitioner incorporated the testimony of the psychiatrists that he suffered from a moderately diminished capacity, and the officers admitted that Petitioner's mother was not told his Miranda rights and that neither Petitioner or his mother had been advised before the statement about the possibility of his being tried as an adult and of receiving the death penalty.

The motion to suppress was denied, and Petitioner thereupon waived his right to trial by jury, and was tried by a three judge panel in the Court of Common Pleas, which convicted him on all counts and on one specification of an aggravating circumstance. A penalty trial was set for February 3, 1975 and reports were ordered from the same three psychiatrists and from the probation department. A motion was filed attacking the constitutionality of the Ohio death penalty statutes and requesting that the specification be dropped and Petitioner sentenced to life imprisonment. Both motions were denied.

At the penalty trial, the psychiatrists stated that Petitioner's IQ had improved dramatically, and conceded that his drug-free state from his arrest to the second examination might be responsible. They admitted not considering his drug habits in determining whether Petitioner was mentally deficient.

Petitioner established at the penalty trial that he was 16 years of age when the offense was committed; that he did not intend the death of the victim and did not participate in the act of killing*; that he had an IQ of 81 when examined two years before by school officials; that the psychiatrists who testified against him had estimated his IQ at 90 shortly after the killing; that at the time of the killing, Petitioner

* The appellate courts below held that there was sufficient evidence to permit the trier of the fact to conclude that Petitioner participated in the killing. They ignored the Ohio rule that circumstantial evidence of an element of an offense must be consistent only with guilt, State v. Kulig, 37 Ohio St.2d 157; other than Petitioner's exculpatory (as to the killing) statement, what little evidence there was was circumstantial.

was under the influence of drugs; that Petitioner had been on drugs on a daily basis for several years; and that Petitioner was emotionally unwell, to the extent that he had to be placed in a special school; his teachers testified that he was not emotionally normal or mature either by adult standards or by comparison with normal youths of his own age group, and that he was constantly on drugs. One teacher saw Petitioner after the killing but before his arrest and described him as "really burned out."

Despite the foregoing, the trial court unanimously concluded that Petitioner had failed to carry his burden to prove to a preponderance of the evidence the existence of one of the three mitigating factors which would result in a life sentence, and sentenced Petitioner to die in the electric chair. Petitioner's appeals were denied by the Court of Appeals for the First Appellate District and by the Ohio Supreme Court, which stayed execution of the sentence until the disposition of this appeal.

The Ohio capital punishment statutes, perhaps as the result of a misinterpretation of Furman by the Ohio General Assembly, have been rewritten to insure the death of a greater proportion of offenders than formerly. In fact, the present system is little more than a mandatory death penalty scheme with a limited exception for offenders who are retarded mentally. The accused is given virtually no meaningful opportunity of surviving the sentencing process once he has been convicted of the offense of aggravated murder and a specification of an aggravating circumstance: his character and record are not determinative factors; there is no meaningful appellate review of the appropriateness of the sentence in comparison with others; if he is a minor, emotionally disturbed and/or his participation in the homicidal act was minor or nonexistent, such facts may not be considered; and with the elimination of mercy provisions, he cannot even beg for his life.

The Ohio statutory scheme also offends the Constitution by several prejudicial procedural provisions: the offender may be coerced into waiving a trial by jury of the issue of his guilt or innocence; he is totally deprived of that right at the penalty trial, and the Ohio statute imposes upon the accused the burden of proving one of the mitigating factors all of which are so remote in the vast majority of cases as to be rendered meaningless.

The Ohio statute coerces defendants charged with aggravated murder and other crimes into waiving their constitutional right to trial by jury of the issue of guilt by virtue of the fact that by waiving a jury at the guilt trial, an accused can guarantee that he will have to convince only one third of the trier of the fact at the penalty trial in order to escape with his life; in the absence of such waiver, he must convince 100 % of the trier of the fact at the penalty trial.

The Ohio Supreme Court decided below that the Constitution does not require that a minor's parents or adult next friend be given his Miranda warnings and an opportunity to consult with him regarding whether to waive the privilege against self-incrimination. The Supreme Court of Indiana has reached a contrary interpretation of the United States Constitution, and review is necessary to resolve the conflict between two sister states as to the meaning of the Constitution.

The Ohio Supreme Court further decided that a minor's statement to police may be voluntary even though the minor and his parent or adult next friend is not advised that he can be tried as an adult, and that the death penalty is a distinct possibility. The Ohio Supreme Court thus is in conflict with the Missouri Supreme Court, which has required that a minor's confession cannot be used against him where he was not advised prior to the giving of the statement that he might be tried as an adult. Review is necessary to resolve this conflict as well.

THE IMPOSITION OF THE SENTENCE OF DEATH FOR
THE CRIME OF AGGRAVATED MURDER UNDER THE LAWS
OF THE STATE OF OHIO (EFFECTIVE JANUARY 1, 1974)
VIOLATES THE PROTECTION AGAINST CRUEL AND
UNUSUAL PUNISHMENT SECURED TO ALL PERSONS BY
THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE
CONSTITUTION OF THE UNITED STATES.

In Furman v. Georgia, 408 US 238 (1972), this Court struck down capital punishment as it was then applied by the states on the basis that the death penalty as applied violated the prohibition against cruel and unusual punishment of the Eighth Amendment to the Constitution of the United States, which prohibition had previously been applied to the states through the Fourteenth Amendment, Robinson v. California, 370 US 660.

After the decision in Furman, most state legislatures, including that of Ohio, hastened to fashion new statutory schemes for the implementation of the death penalty which would withstand constitutional challenges based on Furman. Cases proceeded to trial under the new statutes and, as they proceeded through the appellate process, death rows in state prisons filled anew as the statutes were challenged.

On July 2, 1976, this Court decided five cases construing statutory capital punishment provisions enacted by five states in response to Furman: Gregg v. Georgia, ___ US

___, 96 S.Ct. 2909; Jurek v. Texas, ___ US ___, 96 S.Ct. 2950; Proffitt v. Florida, ___ US ___, 96 S.Ct. 2960; Woodson v. North Carolina, ___ US ___, 96 S.Ct. 2978; and Roberts v. Louisiana, ___ US ___, 96 S.Ct. 3001. The Court, stating that "each distinct system must be examined on an individual basis," Gregg v. Georgia, supra., 96 S.Ct. at 2935, held that capital punishment is not per se unconstitutional as cruel and unusual, upheld the death penalty under the Georgia, Florida and Texas statutes, and rejected as unconstitutional the mandatory death penalties provided by North Carolina and Louisiana.

It shall be demonstrated that the Ohio legislature, in attempting to frame a constitutional scheme for the imposition of the death penalty, to the contrary has fashioned, for all practical purposes, a mandatory death penalty statute providing only an extremely limited exemption to offenders who are severely retarded mentally. In attempting to satisfy the constitutional requirements it perceived in Furman, the Ohio legislature has created a rigid, arbitrary process which ignores the requirement for a fair and constitutional procedure "to select persons for the unique and irreversible penalty of death," Woodson, supra., 96 S.Ct. at 2983.

A. The Ohio statutory scheme for the implementation of the death penalty actually precludes meaningful use of the character and record of the offender as determinative factors in the decision of whether he shall live or die.

To meet the requirements of the Eighth and Fourteenth Amendments, a state capital sentencing system must allow the sentencing authority to consider mitigating factors of a particularized nature, Jurek, supra., 96 S.Ct. at 2956. Among mitigating factors required by the Constitution are the character and record of the offender:

. . . we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

Woodson, supra., 96 S.Ct. at 2991 [Emphasis added]. In support of the conclusion that consideration of the character and record of the offender is constitutionally required, the Court stated in Woodson, also at p.2991:

A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

In the five cases decided on July 2, 1976, the Court analyzed the schemes in each state for presenting the sentencing authority with mitigating circumstances involving the character and record of the offender:

In Gregg v. Georgia, supra., the Court approved

the Georgia procedure which requires the sentencing authority to consider "additional evidence in extenuation, mitigation and aggravation of punishment," including prior record or lack thereof, and also "any mitigating circumstances." Ga. Code Ann. §27-2503 (Supp.1975); § 27-2534.1(b) (Supp. 1975). The Court also states with respect to the Georgia plan:

the jury's attention is focused on the characteristics of the person who committed the crime: Does he have a record of prior convictions for capital offenses [Petitioner Bell does not]? Are there any special facts about the defendant that mitigate against imposing capital punishment (e.g. his youth, the extent of his cooperation with the police, his emotional state at the time of the crime)? 96 S.Ct. at 2936

Ironically, the mitigating factors thus cited by the Court as being sufficiently substantial as to have a bearing on the decision making process of the sentencing authority are all applicable to Petitioner herein, and are all foreclosed to him under the Ohio plan! Petitioner had not been previously convicted of a capital offense; he was 16 years of age at the time of the offense; he was cooperative with the police, and he was under the influence of drugs, under the domination of another person, and emotionally unstable at the time of the offense.

In Jurek, the plan was approved because, although two of the three mitigating factors established by statute were crime-oriented rather than defendant-oriented, the second factor permits consideration of whatever evidence of mitigating circumstances the defense can produce, 96 S.Ct. at 2956-7.

The Florida scheme was approved in Proffitt because fully seven (as opposed to Ohio's three) mitigating factors must be considered, including several applicable to Petitioner but foreclosed under Ohio law: no significant history of prior criminal activity on the part of the offender; the defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor; the defendant acted under extreme duress or under the substantial domination of another person, (the latter factor conceded by the Ohio Supreme Court in our case, 48 Ohio St. 2d at 282); the capacity of the defendant to appreciate the criminality of his conduct (psychiatrists testified that Petitioner suffered from a moderately diminished capacity to comprehend the seriousness of his situation even after his indictment for a capital crime); and the age of the defendant at the time of the crime (Petitioner was 16).

In Woodson, the North Carolina mandatory death penalty was ruled unconstitutional because there were no such standards to guide the sentencing authority in deciding who is to live and who is to die, 96 S.Ct. at 2991, and in Roberts, the Louisiana mandatory death penalty was struck down because: "The Eighth Amendment which draws much of its meaning from the evolving standards of decency that mark the progress of a maturing society . . . simply cannot tolerate the reintroduction of a practice so thoroughly discredited." 96 S.Ct. at 3008.

On its face, the Ohio statutory scheme for the imposition of the death penalty seems to contain some of the constitutionally required factors: the decision as to sentence is made at a bifurcated penalty trial, mitigating factors are established, proof of any of which to a preponderance mandates rejection of the death penalty in favor of life imprisonment, and the sentencing authority is directed by statute to consider the "nature and circumstances of the offense and the history, character and condition of the offender." The appearance is deceptive.

The mitigating factors, proof of which will abrogate the death penalty in any particular case are:

1. The victim of the offense induced or facilitated it.
2. It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.
3. The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

§2929.04 (B) R.C.

It is readily apparent that the mitigating circumstances involve the determination of facts. If the sentencing authority, sitting as the trier of the facts at the penalty trial, finds that any of the three mitigating facts have been established, the offender's life is spared.

By making the penalty trial exclusively a fact-finding procedure, the Ohio legislature excluded any discretion whatsoever that the sentencing authority might exercise in determining who is to live and who is to die. Under the former law, found to be cruel and unusual, a defendant had the right to request mercy. Under the new, supposedly constitutional procedure, he is denied even the right to beg for his life. If he cannot establish the existence of any of the mitigating facts, the sentencing authority has no alternative to sentence him to death. The removal of discretion from sentencing in Ohio capital cases is not accidental. The Ohio Senate Judiciary Committee felt obliged to "[r]efine the House position by retaining the death penalty, but remov[ing] from the judge and jury as much discretion as possible in the punishment determination procedure." Lehman and Norris, Some Legislative History and Comments on Ohio's New Criminal Code, 23 CLEV.ST.L.REV. 8,18 20 (1974).

A review of the Ohio scheme will entail the same procedure as followed in Jurek v. Texas, supra. Both states established three mitigating circumstances, few indeed compared with those established by other states and by the Model Penal Code, which suggests no fewer than eight mitigating circumstances, Model Penal Code § 210.6 (proposed Official Draft, 1962). Each circumstance must be examined to determine whether any permits the

meaningful consideration of the character and record of the offender required by this Court in Roberts; see 96 S.Ct. at 3006.

Clearly, the first mitigating circumstance, that the victim induced or facilitated the offense, will be rarely applicable. The only instance which occurs to the undersigned is in mercy killing situations. At this point, it must be recalled that Ohio is not an ordinary felony murder state; even where a murder is perpetrated during the commission of one of the enumerated felonies, before an aggravated murder conviction will stand, it must be proved beyond a reasonable doubt that the killing was purposeful. § 2903.01 (B) R.C.

Further, this type of killing is so rare that the mitigating circumstance is illusory to all but a very few offenders. Yet even in those cases, character of the accused and his prior record is neither relevant or material to the sentencing process, as prior record and character of the offender have nothing whatever to do with the determination of this mitigating circumstance: whether, in fact, the victim did actually induce or facilitate the offense; either he did or he did not. Whether the prior record and character of the offender is good or bad, it makes no difference on whether the mitigating circumstance can be established.

Consequently, the character and record of the

offender making no difference, the first mitigating factor set forth in the Ohio statute does not meet the requirements of the Constitution.

The record and character of the offender also have no relevance or materiality in determining whether the fact constituting the second mitigating factor exists, that the offense would not likely have occurred but for the fact that the offender was under duress, coercion, or strong provocation. This "mitigating circumstance" involves a situation existing at the time and place of the crime, and the prior record and character of the offender has nothing to do with the determination of whether at the time of the offense he was under duress, or was coerced, or was under strong provocation. One with a good prior record and character is not more likely, because of that character or record, to be susceptible to duress, coercion or provocation, than is one with a bad character and record, or vice versa. Character and record simply have nothing to do with whether or not the second mitigating circumstance has been established, and hence, are not significant or meaningful in the determination.

Finally, the third mitigating factor, that the offense was primarily the product of the offender's psychosis or mental deficiency, may be proved or disproved regardless of the prior record or character of the offender. One who is psychotic or mentally deficient may have no prior record, or an extensive history of conflict with society; he may be of good or bad

character; the two factors simply have no determinative effect upon whether the fact that the offense was the product of the offender's psychosis or mental deficiency has been proved.

In this case, one defense asserted was insanity. For all practical purposes, the rejection by the trial court of this defense also amounts to a rejection of the mitigating circumstance. As mental deficiency is not defined in the Code, the courts must struggle to interpret the meaning of that term. Obviously, from the decisions below, age is not per se determinative. Petitioner had asserted that by virtue of the fact that he was 16 years of age, he was per se mentally deficient, citing the many instances where a minor's freedom is restricted by Ohio law on the basis of minority. The fact that Petitioner was on drugs at the time of the offense, was emotionally ill, was of limited intelligence (estimated IQ of 90 a few weeks after the offense, and an 81 IQ as the result of tests two years before), was easily led and influenced by the codefendant, and that, according to three of Petitioner's teachers, he was below normal in emotional stability and considered abnormal by school authorities, either by adult standards or juvenile standards, all were rejected by the Ohio courts as proof that the offense was the result of Petitioner's psychosis or mental deficiency.

Apparently, the degree of mental deficiency lies somewhere between lunacy and Petitioner's condition as outlined above. There is no definition of mental deficiency in

Ohio's statutory scheme by which the meaning of that term may be accurately determined.

* * * * *

The Ohio statute precludes the independent "consideration of the character and record of the individual" defendant which is "a constitutionally indispensable part of the process of inflicting the penalty of death," Woodson v. North Carolina, 96 S.Ct. at 2991, and is therefore unconstitutional.

B. The Ohio statutory scheme for the imposition of the death penalty provides no meaningful appellate review of the appropriateness of the penalty in relation to other death sentences.

One of the salutary features of the Georgia death penalty statutes cited by the Court in Gregg v. Georgia, supra., is the use of the state's appellate process to review each death sentence vis-a-vis other death sentences so that in cases where the ultimate sanction is imposed its imposition is not disproportionately severe in comparison with other death sentences. The Georgia plan requires the trial judge to complete a questionnaire regarding the relevant circumstances in each capital case, so that the state Supreme Court has a meaningful basis to compare various death sentences.

While Georgia statistics were apparently unavailable, this Court cited with approval the fact that in Florida, the review by the Florida Supreme Court resulted in the reduction of the death penalty to life imprisonment in 8 of 21 cases, Proffitt v. Florida, supra.

Under the Ohio law, on the other hand, there is no meaningful appellate review of the appropriateness of the death penalty-on a case by case basis, nor even on the facts of the individual case. By contrast with the Florida experience, the Ohio Supreme Court to date has reviewed 18 cases in which the death sentence was imposed. The death sentence was upheld in 17. The eighteenth case, State v. Lockett, 49 Ohio St.2d 71, 358 NE2d 1077, was reversed on grounds not related to the imposition of the death penalty and was remanded for a new trial.

In Ohio, appellate courts have never reviewed the appropriateness of the sentence in a criminal case as long as the sentence imposed was within the limitations prescribed by statute, City of Toledo v. Reasonover, 5 Ohio St.2d 22, 213 NE2d 179. One frequently cited Ohio authority, Ohio Jurisprudence 2d, goes further and states that in Ohio, appellate courts do not have jurisdiction to review sentences which are within the statutory parameters. 4 O Jur.2d Appellate Review § 1159.

In addition, since the life or death decision at the penalty trial in a capital murder case in Ohio must be based upon a finding of fact - whether any of the mitigating factors have been established- the Ohio appellate courts are restricted under Ohio law in reviewing the death penalty by the long-standing Ohio rule that appellate courts may not disturb findings of fact by the trial courts.

The Ohio Supreme Court has held on many occasions

that findings of fact by a trial court sitting without a jury are not subject to review and neither the Ohio Supreme Court nor any other reviewing court may substitute its evidential conclusions for those of the trier of the fact. See, e.g. Feterle v. Huettner, 28 Ohio St.2d 54, 275 NE2d 340 (1971), Gillen-Crow Pharmacies, Inc. v. Mandzak, 5 Ohio St.2d 201, 215 NE2d 377 (1966).

Thus, since the Ohio Supreme Court is precluded by Ohio law and its own prior decisions from inquiring into whether the findings of fact are correct, and into the appropriateness of a sentence which is within the limits of the statute, no meaningful review on the appellate level of the appropriateness of the death sentence is possible. That every death sentence reviewed by the Ohio Supreme Court has been upheld where the conviction on which it is based has been upheld indicates that there is no meaningful review in practice as well as under the statutes and case law. As a result, the narrow and rigid strictures limiting the trier of the fact at the penalty trial are not subject to correction at the appellate level.

If there were some discretion in the process at some point, factors generally held to be important in the life-or-death decision might have a meaningful impact on that decision. As we have seen, at the trial level, the trier of the fact is extremely limited in the decision-making process. Similarly, appellate courts in Ohio are without authority to correct the sentence in light of factors which should have a determinative effect - character and record of the offender, etc. The result is a mandatory death penalty with a limited

exemption to those who are severely retarded. Such a system offends the Constitution, and cannot be permitted to continue.

C. The Ohio statutory scheme unconstitutionally chills the exercise of a basic constitutional right by coercing a defendant charged with capital murder into waiving his Sixth Amendment right to trial by jury.

Under the Ohio death penalty statutes, a defendant who insists on his right to a jury trial, upon conviction of the offense and an aggravating circumstance (or, "specification") must convince the sole trial judge of the existence of one or more of the mitigating factors, in order to avoid the death penalty. A defendant who waives a jury trial who is convicted of the offense and a specification need convince but one of the three trial judges in order to avoid a death sentence. We know of no other system in the history of Anglo-American jurisprudence where a party can win his case by convincing but one-third of the members of the trier of the fact.

The situation is similar to that in United States v. Jackson, 390 US 570 (1968), in which this Court held that 18 U.S.C. § 1201(a) impermissibly chilled the right to a jury trial because it allowed the death penalty in kidnapping cases where trial was by jury, and did not permit the death penalty where a jury was waived and trial was to the Court.

The Ohio Supreme Court agreed that any statutory

scheme which chills the right to trial by jury cannot be tolerated constitutionally, but distinguished our situation from that in Jackson because in Jackson, the defendant could guarantee avoidance of the ultimate penalty by waiving a jury trial, and under the Ohio statute, the death penalty is possible under either alternative, and may be avoided under either. "Thus, we are confronted with only the arguably greater possibility of the avoidance of the death penalty by the requirement of unanimity within the [three-judge] panel, and not with its absolute avoidance as in Jackson." 48 Ohio St.2d at 275.

The Ohio Supreme Court stated that the situation was the same in deciding whether to have a jury determine the issue of guilt or innocence, citing the greater possibility of convincing one of twelve jurors of innocence than of convincing one of three judges of the presence of a mitigating factor. The problem with this "analogy" is that it is not analogous - by convincing one juror, a criminal defendant has not won - he has merely obtained a hung jury, and one "hung" at 11-1 for conviction at that. But by convincing one of the three judges at the penalty trial, the defendant has won - he has avoided the death penalty.

The decision whether to waive a jury in order to secure the benefit of the Ohio law providing a lesser mathematical burden at the penalty trial is not, as the Ohio courts held, made in a vacuum. In a case such as this, where there is no alibi defense, or self-defense; where an extremely damaging statement has been given, and the defense

motion to suppress that statement has already been denied, and there are indications from pretrial psychiatric reports that an insanity defense will not prevail, the compulsion to waive a jury and increase the "odds" on avoiding the death penalty is substantial. Such occurred here, and Petitioner was denied his right to a trial by jury, not only on the murder charge, but on the robbery and kidnapping charges as well.

A criminal defendant, while as the Ohio Supreme Court has suggested below has many choices to make in the course of the proceedings against him, should not have to make such a "Hobson's choice" as that forced upon him by the Ohio statutes - particularly where the stake is his very life.

D. Imposition of the death penalty against a 16 year old youth who is of low intelligence and considered socially and emotionally immature and abnormal, and who has not been proved beyond a reasonable doubt to have participated in the homicidal act for which he stands convicted is grossly disproportionate and offends contemporary standards of decency.

At the penalty trial, Petitioner established that he was 16 at the time of the offense, was then under the influence of drugs (and had been, on a daily basis, for three years previously), was placed at a school for disruptive youth and not considered normal by the school board, had an IQ of 81 two years before and his IQ was estimated

at 90 a few weeks after the crime by three court-appointed psychiatrists*, and was easily led by Hall.

The prosecution failed to prove that Petitioner had participated in the act of killing. The only evidence as to what occurred was Petitioner's statement, which denied any participation, or advanced knowledge that Hall intended to kill the victim. The state sought to establish Petitioner's participation in the act of killing by the fact that the victim's body was bruised, but the coroner indicated that the bruises could have been inflicted in any number of ways. The State further suggested that the victim necessarily had to have been held by one of the defendants while he was shot by the other, but there is nothing in the evidence to indicate that such occurred.

It is submitted that even an aider and abettor's involvement in a crime must be proved beyond a reasonable doubt, as must his criminal intent. In State v. Lockett, 49 Ohio St. 2d 48, however, the Ohio Supreme Court by a 4-3 vote seems to have abandoned the Ohio law that even in felony murder prosecutions it is incumbent upon the State to establish the offender's purpose to kill. No such intent was proved on Petitioner's part by the State.

Under all the circumstances of this case, the imposition of the ultimate penalty upon this Petitioner is offensive to the prohibition against cruel and unusual punishment, and the

*After conviction, Petitioner scored higher in an IQ test, but this was after he had been drug-free for four months and had had regular food and medical attention in the jail for that period.

statutory scheme whereby the death penalty can be imposed upon such a criminal defendant is repugnant to the Constitution.

E. The Ohio statutory scheme unconstitutionally places the burden of proof upon the defendant in a penalty trial after the defendant has been convicted of the offense and of a specification of an aggravating circumstance.

In Mullaney v. Wilbur, 421 US 684 (1975), this Court held that the prosecution bears the burden of proof of every element of a criminal offense, and consequently ruled that a Maine statute that required the defense to prove that a killing was done in the heat of passion in order to avoid a conviction of murder rather than manslaughter was a violation of the Due Process Clause of the Fourteenth Amendment.

Here, the Ohio statute is silent as to which party bears the burden of proving to a preponderance the existence of one of the mitigating circumstances. Yet in our case, Petitioner was required to meet the burden of proof, as is illustrated from the record [R.494]:

JUDGE MATTHEWS: The burden is upon the defendant to prove by a preponderance of the evidence one of the mitigating circumstances.

JUDGE KEEFE: O.K.

This colloquy between two-thirds of the panel indicates that, whatever the meaning of the Ohio statute, Petitioner bore the burden of proof of a mitigating circumstance in this case.

The Ohio Supreme Court has held since Petitioner's trial that the defendant does bear the burden of proof in the penalty trial following his conviction of aggravated murder and a specification, State v. Reaves and Woods, 48 Ohio St.2d 127 at 135.

It is submitted that under the Ohio scheme, where the penalty trial involves a narrow and rigid factual determination by the trier of the fact, the situation is not merely a hearing to determine sentence in the usual sense where burden of proof is not particularly important. In the usual situation, a sentencing judge will consider anything either party chooses to place before it. In Ohio capital murder cases, however, the sentencing authority must base its sentence upon specific factual determinations, and it is therefore unjust to require the defendant to prove that he should be excepted from the ultimate penalty. Justice would seem to require that the party seeking the death penalty, the State, bear the burden of proving every fact which is necessary for the imposition of that penalty.

F. The Ohio statutory scheme for the imposition of the death penalty unconstitutionally denies the accused the right to the judgment of a jury of his peers as to the correctness of the death penalty.

While this Court has not yet suggested that jury sentencing is required by the Constitution, it has not yet considered a post-Furman death penalty statute, such as Ohio's, which totally excludes the institution of the jury from the

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sentencing process. While the Florida statute providing that the jury recommendation is "only" advisory was upheld in Proffitt v. Florida, supra., the Court cited the position of the Florida Supreme Court that where the trial judge imposes the death penalty over a jury recommendation of life imprisonment "the facts suggesting a sentence of death should be so clear that virtually no reasonable person could differ," 96 S.Ct. at 2965.

Jury determinations are one of "the two crucial indicators of evolving standards of decency respecting the imposition of punishment in our society," Woodson v. North Carolina, supra. Jury participation in the process of sentencing in capital cases represents a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," Snyder v. Massachusetts, 291 US 97, 105 (1934). Indeed, "[e]xcept for four States that entirely abolished capital punishment in the middle of the last century, every American jurisdiction has at some time authorized jury sentencing in capital cases." McGautha v. California, 402 US 183, 200 n11 (1971).

Since judges do impose the death penalty "somewhat more often" than do juries, Kalven & Zeisel, The American Jury, p.436 (1966), Ohio, in enacting the present statute, to some extent increased the statistical likelihood that an accused would not survive the sentencing process. Also, the input of a jury recommendation and the resulting cognizance by the law of the conscience of the public has been removed from the Ohio sentencing process.

The Ohio scheme provides that the death sentence

can be avoided only if one of three mitigating facts is proved. The sentencing process thus involves three factual determinations of the kind that juries have historically made. A criminal defendant is entitled to the judgment of a jury of his peers as to the facts that affect significantly the decision of whether he is to live or die.

A state may not dilute the standards by which the life or death sentence is determined by "characterizing them as factors that bear solely on punishment," Mullaney v. Wilbur, supra. In United States v. Kramer, 289 F.2d 909 (2d Cir. 1961), Judge Friendly, writing for the Second Circuit, held that where an aggravating circumstance is not "an element of the crime but rather a fact going only to the degree of punishment," and where the presence of the aggravating circumstance substantially increases the severity of the punishment, "the Sixth Amendment entitles a defendant to have that fact determined by the jury rather than by the sentencing judge." Id. at 921.

The Ohio statute eliminating the jury from all facets of the sentencing process thus deprives an accused in a capital case of the benefit of the insight of the jury as a reflection of the conscience of the community, and of the right to have the crucial matters of fact determining his fate to be decided by the traditional and constitutionally mandated means - a jury of his peers.

II.

PETITIONER WAS COERCED INTO WAIVING HIS RIGHT TO TRIAL BY JURY BY THE STATUTORY SCHEME FOR THE DEATH PENALTY AND HIS SIXTH AMENDMENT RIGHTS WERE THEREFORE VIOLATED.

We have argued this point previously in connection with our assault on the Ohio death penalty statute, ante pp. 27-29. We include the point here to raise the question independently of that statute, for even had Petitioner been successful at the penalty trial, and been sentenced to life imprisonment, the Ohio statute would have still coerced him into waiving his precious right to trial by jury at the trial to determine whether he was guilty, not only of aggravated murder, but of kidnapping and aggravated robbery as well.

I I I .

WHETHER A CONFESSION BY A JUVENILE 16 YEARS OF AGE MAY BE USED AGAINST HIM AT TRIAL WHERE HIS PARENTS OR ADULT NEXT FRIEND WERE NOT GIVEN THE MIRANDA WARNINGS NOR PERMITTED TO CONFER TO CONSIDER WHETHER TO WAIVE HIS RIGHTS BEFORE SUBMITTING TO CUSTODIAL INTERROGATION.

I V.

WHETHER A STATEMENT GIVEN BY A JUVENILE CAN BE TRULY VOLUNTARY WHERE HE AND HIS PARENTS ARE NOT ADVISED BEFORE THE STATEMENT IS GIVEN THAT HE MIGHT LOSE THE PROTECTION OF THE JUVENILE COURT, AND THAT HE MIGHT SUFFER THE DEATH PENALTY.

THE DECISION BELOW HAS CREATED A CONFLICT BETWEEN TWO ADJACENT SISTER STATES IN THE APPLICATION OF FEDERAL CONSTITUTIONAL RIGHTS CONFERRED ON THEIR CITIZENS BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Ironically, had the offense for which Petitioner may lose his life occurred fifteen or twenty miles to the west, in Indiana, his statement would not have been admitted into evidence against him, and, since other evidence against him was meager indeed, he would probably not have been convicted at all.

A. THE CONSTITUTIONAL RIGHTS INVOLVED.

Petitioner contends that the statement of a minor is inadmissible unless the Miranda warnings required before in-custodial interrogations are also given to his parents or adult "next friend" as well, and that before he waives those rights, the parents or adult friend and the minor should have an opportunity to discuss whether to waive the right to silence and counsel. Involved are the Fifth Amendment right against self-incrimination, the Sixth Amendment right to counsel, and the right to due process of law and to the equal protection of the laws guaranteed by the Fourteenth Amendment.

B. THE CONFLICTING RULINGS IN OHIO AND INDIANA.

In Lewis v. State, Ind., 288 NE2d 138, the Supreme Court of Indiana held:

. . . a juvenile's statements or confession cannot be used against him at a subsequent trial or hearing

unless both he and his parents or guardian were informed of his rights to an attorney, and to remain silent. Furthermore, the child must be given an opportunity to consult with his parents, guardian, or an attorney representing the juvenile as to whether or not he wishes to waive those rights. After such consultation the child may waive his rights if he so chooses provided, of course, that there are no elements of coercion, force or inducement present.

The Supreme Court of Ohio rejected this proposition totally:

Appellant asserts . . . that a statement by a juvenile cannot be used against him at trial unless both he and his parents or guardian were informed of his Miranda constitutional rights, and unless the minor was given an opportunity to consult with his parents, guardian or attorney as to whether he should waive those rights.

Appellant cites Indiana case law and apparently concedes that this proposition has no support in Ohio authorities. We decline his invitation to alter existing Ohio law. We perceive no requirement in Miranda that the parents of a minor should be read his constitutional rights along with their child, and that, by extension, both parent and child are required to intelligently waive those rights before the minor makes a statement. 48 Ohio St.2d at 276-7

The facts of our case and those of Lewis, the Indiana case, are remarkably similar: Petitioner was 16 when interrogated, Lewis was 17; both were initially taken into custody for "questioning," rather than being charged immediately; both were interviewed for a few hours; both were advised fully of their Miranda rights; both waived those rights without having had the opportunity beforehand to consult with parents or guardians who had themselves been advised of the Miranda rights; both gave incriminating statements later used against them in a trial in which each was convicted of the highest degree of murder in his respective jurisdiction. At least the Ohio Supreme Court did not attempt to distinguish Lewis on its facts: for the purposes of this constitutional question, the

facts are identical; identical, that is except that Lewis survived the criminal process - Petitioner awaits a death sentence.

The grievous error committed by the Ohio Supreme Court below is that it assumes that there can be an "Indiana Rule" or an "Ohio Rule" in the interpretation of the United States Constitution. We take pains to note that neither state Supreme Court ruled on this question under the law or constitutional authority of that state. The Indiana opinion refers to the Fifth and Sixth Amendments to the federal Constitution. The Ohio Supreme Court refers to "Miranda constitutional rights." Thus, the disparity between the rulings cannot be explained away as legitimate interpretations by state courts of their respective state laws.

There is but one United States Constitution. There can be , if there is to be justice throughout the land, only one interpretation of the provisions of that Constitution throughout our nation. While we believe that the Indiana interpretation is correct, the decision herein by the Ohio Supreme Court has created a conflict which can be resolved only by the granting of the writ of certiorari herein. The conflict is underscored in this case by the fact that the Petitioner herein awaits electrocution for an offense which, if committed a few miles to the west, in the same nation but in a different state, would have had materially different consequences for Petitioner, due to conflicting interpretations by two states of the same document which is supreme over both

jurisdictions. The situation cannot be permitted to continue. This Court is the only proper forum in which such differing interpretations by the states of the United States Constitution can be resolved. This case affords the opportunity to resolve the conflict.

C. THE EFFECT OF THE FAILURE OF POLICE TO ADVISE PETITIONER AND HIS MOTHER OF THE POSSIBILITY OF THE LOSS OF HIS JUVENILE STATUS AND OF THE INFLICTION OF THE DEATH PENALTY.

This issue was separately presented to the Ohio appellate courts, but is presented herein as it formed part of the basis for the motion to suppress Petitioner's statement in the trial court.

The Ohio Supreme Court held that advice of the kind sought here to be required "would have been pure, and perhaps improper, speculation since appellant had not yet given his statement." We submit that once police had the statement, the possibility of death as an adult was greatly enhanced. The victim, Julius Graber, was a white, 64 year old pillar of the Cincinnati Community, the director of a Jewish home for the aged. He was kidnapped by two black youths, taken to a deserted cemetery, and executed in a brutal manner. The crime and the victim were properly the subjects of a great deal of attention in the local media. It became immediately apparent that the fullest measure of an outraged community's retribution would be visited upon anyone charged with such a crime.

Under such circumstances, that a 16 year old youth confessing to such an offense would be bound over as an adult by the Juvenile Court, indicted, tried, convicted and executed as an adult is hardly speculation, but could have been foreseen with almost mathematical precision by a veteran homicide detective. The almost casual statement to Petitioner's mother that her son was being held in a homicide and kidnapping did not provide her or her son with the necessary information which was required in the making of an intelligent, informed decision of whether to waive the right against self-incrimination.

The principal question in the mind of any suspect who is being pressed for a statement while in police custody is the benefit which will accrue by virtue of remaining silent vis-a-vis the benefit which will inure from waiving the right to silence and the giving of the statement. Had Petitioner and/or his mother been aware that his statement constituted the only evidence placing him at the scene of the crime* and that the State would almost certainly seek Petitioner's conviction and execution as an adult, taken together with the emotional problems outlined previously herein, indicate clearly that the decision to waive by Petitioner alone was not sufficiently informed or intelligent as to be considered voluntary.

In short, Petitioner and his mother were never made aware of what the police, and any lawyer worth his salt could have concluded: that a decision to give a statement

* Petitioner's fingerprint was found on the outside of Mr. Graber's auto, but that print, standing alone, could not support a conviction in the absence of evidence showing that it could only have been impressed at the scene of the crime, see United States v. Collon, 426 F.2d 939 (6 Cir.1972).

could, and might yet, cost Petitioner his life. His decision to waive his right to counsel and against self-incrimination does not approach the standard required of valid waivers of constitutional rights, the intentional relinquishment of a known right or privilege, Johnson v. Zerbst, 304 US 458 (1938). Under the circumstances of this case, no effective waiver of the right to silence was possible.

It is interesting to note that the Supreme Court of the State of Missouri has held that before the confession of a minor can be deemed voluntary the juvenile must be warned that he could be prosecuted as an adult if that is indeed a possibility, State v. McMillian, 514 SW 2d 528; see also State v. Pike, 516 SW2d 505. The Supreme Court of Nebraska, on the other hand, has rejected this position, State v. Stewart, ___ NW2d ___, decided February 4, 1977.

Thus, there seems to be a conflict developing as to whether a confession is valid where the juvenile suspect is not advised beforehand that the possibility exists that he may be prosecuted and punished as an adult. Such knowledge certainly is necessary as a basis for the accused to make an informed decision.

This case provides the opportunity to resolve the conflict in this area as well as in the conflict set forth in Section III ante.

C O N C L U S I O N

The within case is one in which issues of great importance other than the constitutionality of the Ohio death penalty statutes can be resolved. There are serious conflicts between the Supreme Courts of several states as to the interpretation of the United States Constitution which can be resolved by the granting of the writ herein, in addition to the question of the constitutionality of the death penalty.

This Court has not yet reviewed a state system for implementation of the death penalty where the jury is totally excluded from the sentencing process, as in Ohio. All of the features of the Florida, Georgia and Texas statutes lauded by this Court as providing against the cruel and unusual infliction of the death penalty are conspicuous by their absence from the Ohio statutes.

The Ohio death penalty statutes provide, in essence, a mandatory system with a limited exclusion for those mentally defective, and that crucial term is not defined by the statute. For the reasons stated herein, the Ohio statutes do not comport with the Constitution. Defendants charged with aggravated murder who are convicted of that offense and of a specification of an aggravating circumstance are denied a meaningful opportunity to survive the sentencing process.

Respectfully Submitted,

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APPENDIX A

Opinion of the Supreme Court
of Ohio, reported at 48 Ohio
St.2d 270, 358 NE2d 556

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JANUARY TERM, 1976. [48 Ohio St. 2d

Statement of the Case.

THE STATE OF OHIO, APPELLEE, v. BELL, APPELLANT.

[Cite as State v. Bell (1976), 48 Ohio St. 2d 270.]

Criminal law—Aggravated murder—Imposition of death penalty—Waiver of jury trial—R. C. 2929.03(C)(1), (2) and (E)—Constitutionality—Mitigation hearing—Relevant factors.

1. A defendant is not coerced or impelled to waive his constitutional right to jury trial by R. C. 2929.03(C)(1), (2) and (E), under the provisions of which an offender who waives a jury trial need persuade only one member of the three-judge panel at the mitigation hearing to avoid imposition of the death penalty.
2. Relevant factors such as the age of the defendant and prior criminal record are among those to be considered by the trial judge or three-judge panel in determining whether the existence of a mitigating circumstance pursuant to R. C. 2929.01(B) (2) and (3) was established by a preponderance of the evidence.

(No. 76-499—Decided December 22, 1976.)

APPEAL from the Court of Appeals for Hamilton County.

On October 16, 1974, at about 11:00 p. m., police discovered Julius Graber lying in the woods in Spring Grove Cemetery in Hamilton County critically injured from a shotgun wound to the back of his head. He was pronounced dead on arrival at the hospital.

Approximately one week thereafter, Willie Lee Bell, defendant-appellant, was arrested for the murder of Julius Graber. Samuel Hall, Bell's companion, was arrested the day after Graber's body was discovered. Bell was then a minor of 16 years of age, and Hall was an adult. Following proceedings in the Juvenile Division of the Court of Common Pleas, Bell was bound over to the Hamilton County Grand Jury and was indicted jointly with Hall on

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two counts of aggravated murder, under R. C. 2903.01, with specifications of aggravated robbery and of kidnapping pursuant to R. C. 2929.04(A)(7). Bell entered pleas of not guilty and not guilty by reason of insanity.

Bell and Hall were tried separately. The trial court found Bell to be sane and competent to stand trial, overruled a motion to suppress any inculpatory statements, and accepted Bell's waiver of trial by jury and request to be tried by a three-judge panel.

The record tends to reveal the following series of events. On October 16, 1974, Bell and Hall went to a community center in Cincinnati, following which they went to Hall's home to borrow his brother's Grand Prix Pontiac automobile. In that car, Bell and Hall proceeded to Victory Parkway, where they observed a 1974 blue Chevrolet. When the Chevrolet turned into a parking garage, Hall, driving his brother's car, did the same, and followed it to the second level of the garage. After the Chevrolet was parked, Hall got out of the Pontiac with a 20-gauge "sawed-off" shotgun and accosted the Chevrolet's driver, 64-year-old Julius Graber. Graber was forced into the trunk of his own vehicle, and Hall drove that car, with Bell following in the Pontiac, and parked it near his home. Bell parked the Pontiac at Hall's home, and then drove Graber's Chevrolet toward Spring Grove Cemetery. After driving past the cemetery, Bell stopped, reversed direction, and then backed the car into a lane that went inside the cemetery premises.

At this point, Robert Pierce, Jr., a resident of an apartment building near the cemetery, had just returned from work and was sitting in the parking lot of the building listening to his car radio. Pierce observed a vehicle stopped in the cemetery with its parking lights on. He heard two car doors close, one after the other, turned his radio down to listen, and then heard a voice plead "Don't shoot me. Don't shoot me." Pierce turned his radio off, and shortly thereafter heard one shot, followed, after an interval, by a second shot. He then saw the interior light

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of the car go on, and a man enter the parked car on the passenger side and move behind the wheel. Pierce heard two car doors close, saw the interior light go off, and then watched the car leave the cemetery, without any lights. Pierce called the police, around 10:50 p. m., who subsequently discovered Graber.

Hall and Bell drove to Dayton, where they spent the night in the Graber Chevrolet. The following morning, Bell driving, they stopped at a service station to ask directions for finding work. After questioning the attendant, Bell and Hall left, but shortly returned. Hall then thrust a shotgun at the attendant, Kenneth B. Hardin, took the keys to Hardin's automobile, forced him into the trunk of his car, and drove it away from the station. Bell followed in Graber's Chevrolet. The Hardin car, however, was stopped by a State Highway Patrolman, and when Hardin pounded on the trunk lid, he was discovered and released by the officer. Hall was arrested, and the shotgun was found and removed from the car's interior. Meanwhile, Bell, who was still following, proceeded back to Cincinnati, abandoned the Chevrolet on Beatrice Avenue, and returned to his residence on Preston Avenue.

Approximately one week later, following the interrogation of Hall and other investigative effort, Cincinnati police appeared at the Bell residence. Bell was taken to police headquarters to answer questions in connection with the Hall investigation and was given his *Miranda* warnings. When the answers to preliminary questions indicated a possible connection with Hall, Bell was again given his *Miranda* warnings. Approximately one hour later, Bell was given his *Miranda* warnings a third time on a printed "Notification of Rights" form, whereupon he signed the "Waiver of Rights" portion. Bell was asked to make a recorded statement, and was advised that he could have his mother present. Although Bell indicated that he did not want his mother present, the officer called Bell's mother to tell her that her son was involved in a homicide, a kidnapping and an armed robbery, and that he was going to be charged with the offenses. An offer was made to trans-

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port her to headquarters to be with her son when he made his statement, but she declined.

A recorded statement was taken from Bell which was eventually received in evidence. It confirmed most of the above factual details, but denied any intention of Bell to take part in a homicide. Bell conceded his presence during the kidnapping of Graber, but claimed he was not aware of the shotgun until Hall got out of the Pontiac in the parking garage to threaten Graber with it. Bell conceded driving Graber's car to the cemetery and backing into the cemetery lane, but insisted that it was Hall who removed Graber from the trunk, and that it was Hall who took Graber into the bushes. Bell said he then heard a shot and Graber pleading for his life. After the first shot, according to Bell's recorded statement, Hall ran back to the vehicle to get another shotgun shell and then returned to the bushes, whereupon Bell heard the second shot. Hall then drove Bell to Dayton where the incident with the service station attendant occurred. In his statement, Bell attributed the active part of the incident to Hall, but admitted following Hall in Graber's Chevrolet for some 20 minutes before Hall was stopped by the highway patrolman.

Additional expert testimony identified a shell casing found at the scene of the homicide as having been fired from the shotgun found in the car Hall was driving at the time of his arrest in Dayton, and also identified a latent fingerprint from the outside window on the driver's side of the Graber car as being that of Bell's.

After Graber had been pronounced dead at the hospital, where attendants discovered that he had secreted money and other valuables in his shoes, his body was taken to the morgue. A post-mortem examination revealed that death had resulted from a wound to the rear of the head inflicted by a shotgun shell at near-contact range. Testimony established that the head and hand wounds Graber received were consistent with the theory that the fatal shot was fired while Graber's hands were clasped behind his head.

The defense offered only one witness, a Columbus

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police officer who had interrogated and taken several statements from Hall. The statements were not, however, offered in evidence at the trial, and the case went to the panel on the basis of the evidence presented by the prosecution.

At the conclusion of trial, the panel unanimously found Bell guilty of aggravated murder as charged on the second count of the indictment, and guilty of the specification to the second count, that the aggravated murder was committed during a kidnapping. Bell was also found guilty of the third and fourth counts of aggravated robbery and of kidnapping, respectively.

Following pre-sentence and psychiatric examination, a mitigation hearing was held pursuant to R. C. 2929.03, *et seq.* The panel found that none of the mitigating circumstances specified in R. C. 2929.04(B) had been established by a preponderance of the evidence. Bell was sentenced to 7 to 25 years on the kidnapping charge; to 7 to 25 years on the aggravated robbery charge, to run consecutively with the first sentence; and to death by electrocution on the aggravated murder charge.

The Court of Appeals affirmed the judgment of the trial court, and the cause is now before this court as a matter of right.

Mr. Simon L. Leis, Jr., prosecuting attorney, Mr. Robert Hastings, Jr., and Mr. William P. Whalen, Jr., for appellee.

Mr. H. Fred Hoefle and Mr. Thomas A. Luken, for appellant.

PAUL W. BROWN, J. Appellant Bell raises ten propositions of law. The first three of these assert that Ohio's statutory scheme for the imposition of the death penalty is unconstitutional. That issue was decided by this court in *State v. Bayless* (1976), 48 Ohio St. 2d 73, and need not be reconsidered here. Those propositions of law are overruled.

Appellant asserts in his fourth proposition of law that

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he was unconstitutionally coerced into waiving his right to trial by jury by the provisions of R. C. 2929.03(C)(1), (2) and (E) which provide that if a defendant is tried by jury and convicted, then the trier of fact at the mitigation hearing is the one trial judge who presided over the jury trial; but, if the defendant is tried by a three-judge panel following a waiver of a jury trial, then the trier of fact at the mitigation hearing is the same three-judge panel.

Appellant contends that this statutory scheme coerces defendants, and coerced him, into waiving their right to trial by jury. Before a three-judge panel can impose the death penalty, it must unanimously find that the defendant has failed to establish the existence of one or more of the mitigating circumstances enumerated in R. C. 2929.04(B). Thus, if tried before a panel, a defendant need convince only one judge out of three that such mitigation existed. If, however, a defendant elects a jury trial, he must convince the sole trial judge at the penalty proceedings that a mitigating circumstance existed. Appellant asserts that this scheme impels defendants to select trial by panel, rather than by jury, because the dread of the death sentence is an overwhelming consideration.

A statutory scheme which deliberately or unintentionally chills the right to trial by jury cannot constitutionally be tolerated. Appellant relies on *United States v. Jackson* (1968), 390 U. S. 570, in which the United States Supreme Court held that a federal statute had such an impermissible chilling effect because it allowed the death penalty in kidnapping cases where trial was by jury, but did not permit the death penalty where trial was by the court.

However, unlike the statute in *Jackson*, the death penalty is possible under the Ohio statute under both alternatives, and it may be avoided under both alternatives. Thus, we are confronted with only the arguably greater possibility of the avoidance of the death penalty by the requirement of unanimity within the panel, and not with its absolute avoidance as in *Jackson*.

Although appellant asserts that there is a greater pos-

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sibility of convincing one of three judges on a panel of a mitigating factor than one judge alone, by the same logic, there is also a greater possibility of convincing one or more of 12 jurors of the absence of evidence of guilt beyond a reasonable doubt than so convincing one of three judges. If the first consideration inclines against a jury trial, then the latter inclines toward one. The balance struck by these competing considerations is for the judgment of the defendant and competent trial counsel.

As noted, this statutory scheme furnishes a choice for defendants. Presumably, if no choice were offered, coercion would not be alleged by appellant. We see nothing unreasonable or coercive in the statute: there are pros and cons with respect to each alternative. If a defendant feels uncomfortable with a jury as the trier of fact at trial and the trial judge as the trier of fact at the mitigation hearing, then he may elect a three-judge panel as the trier of fact for all the proceedings. We see nothing objectionable in providing the defendant with a choice, absent, of course, an allegation of ineffective trial counsel. No such allegation was here made.

Further, the Court of Appeals concluded from statistics in Hamilton County that, in actual practice, this statutory scheme does not coerce or impel a defendant to waive jury trial. We are presented with no contrary evidence. Appellant's fourth proposition of law is overruled.

Appellant asserts in his fifth proposition of law that a statement by a juvenile cannot be used against him at trial unless both he and his parents or guardian were informed of his *Miranda* constitutional rights, and unless the minor was given the opportunity to consult with his parents, guardian or attorney as to whether he should waive those rights.

Appellant cites Indiana case law and apparently concedes that this proposition has no support in Ohio authorities. We decline his invitation to alter existing Ohio law. We perceive no requirement in *Miranda* that the parents of a minor shall be read his constitutional rights along with

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their child, and that, by extension, both parent and child are required to intelligently waive those rights before the minor makes a statement. Appellant's mother was given every opportunity to be with her son, and, after declining, her presence cannot be forced by police.

When a minor is sought to be interrogated, the question of whether he intelligently and voluntarily waives his rights cannot always be decided by the same criteria applied to mature adults. See *Haley v. Ohio* (1948), 332 U. S. 596; *In re Gault* (1967), 387 U. S. 1. Such criteria necessarily varies with certain factors as the age, emotional stability, physical condition, and mental capacity of the minor. Appellant was adjudicated competent to stand trial as an adult, and thus is not afforded as much protection as a very young or disabled child who is not as capable of intelligently waiving his rights.

We are impressed with the meticulous care with which the police approached appellant's rights. Appellant was advised of his rights three times, and, the last time, was asked whether he understood them. He indicated that he did, and signed a waiver of those rights. Appellant was informed further by the officer that he could have his mother present while making his statement, but he indicated he did not wish her present. The officer nonetheless phoned appellant's mother and informed her that her son was being held for involvement in a homicide, an armed robbery and a kidnapping, and asked further if she would like to be present when her son gave a statement. The officer offered her transportation to and from police headquarters, but she declined this offer along with the opportunity to be present at the interrogation. After being informed of this conversation, appellant again declined to have his mother present when he gave his statement.

Upon review of the record, we find that the prosecution satisfied its burden of proving that the inculpatory statement by the minor appellant was made pursuant to an intelligent and voluntary waiver of his constitutional rights of which he was fully advised, giving due regard to

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the requirement that a minor be given even more scrupulous attention to the issues of voluntariness and understanding than an adult. Appellant's fifth proposition of law is overruled.

In his sixth proposition of law, appellant asserts that a juvenile's statement is involuntary and may not be used against him if both he and his parents or guardian have not been advised that he may suffer the death penalty with the use by the prosecution of the statement, and if he and his parents or guardian have not been advised that he may lose the protection of the Juvenile Court.

We find this proposition without merit. Appellant has cited no authority from any jurisdiction that supports it. The officer related to appellant's mother all of his knowledge at that point: that appellant was being held in connection with a homicide, a kidnapping and an armed robbery. Any further advice by the officer concerning the death penalty or Juvenile Court would have been pure, and perhaps improper, speculation since appellant had not yet given his statement. Accordingly, the sixth proposition of law is overruled.

Appellant argues in his seventh proposition of law that one who participates in an armed robbery and a kidnapping is not guilty of aggravated murder where the other participant takes the victim out of his presence and deliberately kills him, absent evidence of the first participant's purpose to kill, or that he aided and abetted the actual slaying with the intent that the victim die.

Clearly there is ample evidence that appellant affirmatively assisted and acted to complete the murder. Appellant's denial could be reasonably disbelieved after considering all relevant circumstances, especially that Hall was arrested the next day with a would-be victim in the trunk and appellant following in another car, presumably attempting to carry out the same scheme of murder.

The foregoing evidence is sufficient to sustain a finding of guilt because, under R. C. 2923.03(A)(2) and (F), one who aids and abets another in committing an offense

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is guilty of the crime of complicity, and may be prosecuted and punished as if he were the principal offender.

But, in this capital case, this proposition need not be overruled solely on the above grounds. The panel was not required to accept appellant's version of the murder. As the trier of fact, it was within the province of the panel to determine which was the credible evidence. Thus, the gist of appellant's seventh proposition is that the conviction of aggravated murder was contrary to the manifest weight of the evidence. Upon review of the entire record, we hold that there was ample, credible evidence from which the panel could have concluded that appellant actively participated in the murder. Appellant's own statement confirms his involvement in the kidnapping and the armed robbery, and concedes further that, after he drove into the cemetery, he asked Hall what was going to be done next. The court could reasonably disbelieve, as we do, that Graber lay quietly with his hands behind his head while Hall left him alone to return to his car to reload his shotgun. Evidence of bruises on Graber's body, appellant's statement to police, the physical circumstances of the slaying, and the testimony of the eyewitness Pierce all would have justified the panel's rejection of appellant's version and its conclusion that Bell either committed, or actively assisted in, the murder. The seventh proposition of law is therefore overruled.

Appellant in his eighth proposition of law contends that where the prosecutor fails to advise the defense counsel of the names, addresses and criminal records of witnesses after proper discovery requests, the trial court should not permit those witnesses to testify over objection, or, alternatively, should grant motions to strike such testimony. This proposition is not well taken. The record shows that in most instances the prosecution did not have such information, but orally communicated the information to defense counsel as it was acquired. The trial court carefully examined the possibility of prejudice to appellant, and concluded that no such prejudice existed. This proposition of law is overruled.

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Appellant asserts in his ninth proposition of law that a minor is "mentally deficient" within the meaning of R. C. 2929.04(B)(3), and therefore cannot be sentenced to death after a conviction of aggravated murder with specifications. The Revised Code does not define "mental deficiency"; therefore, unless usurped by a judicial definition, the term must be accorded its common, everyday meaning, keeping in mind that the statutory language defining mitigating circumstances must be strictly construed against the state and liberally construed in favor of the accused. See R. C. 2901.04(A).

However, we do not agree that a minor is *per se* "mentally deficient" within the meaning of R. C. 2929.04(B)(3). Such an intention by the General Assembly could have easily been provided for by clear and simple language. Upon review of the statute, we do not believe the General Assembly intended that a 17-year-old defendant is conclusively "mentally deficient." The ninth proposition of law is overruled.

In his tenth proposition of law, appellant alternatively argues that even if a minor is not *per se* "mentally deficient," for purposes of R. C. 2929.04(B)(3), the circumstances of this case establish by a preponderance of the evidence that the offense was a product of his mental deficiency, and that the imposition of the death penalty was error.

In considering this proposition, we will not limit ourselves, as appellant has, to the mitigating circumstances of mental deficiency. R. C. 2929.04(B) states:

"Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance [sic] of the evidence:

"(1) The victim of the offense induced or facilitated it.

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"(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

"(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity."

The purpose of mitigation is to recognize that the punishment assigned for a criminal act may, for ethical and humanitarian reasons, be tempered out of consideration for the individual offender and his crime. *State v. Woods* (1976), 48 Ohio St. 2d 127. The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. *Williams v. New York* (1949), 337 U. S. 241, 247.

We will examine each of the three mitigating circumstances provided for in R. C. 2929.04(B) to determine if the evidence established that such a mitigating factor existed.

We need not spend much time or effort, though, in discussing R. C. 2929.04(B)(1) as there was no evidence whatsoever that the victim induced or facilitated the crime.

However, the two remaining mitigating circumstances merit consideration. It has been alleged that the mitigating circumstances under R. C. 2929.04(B) are unconstitutionally narrow because a number of very important factors, such as the age and criminal record of the defendant, appear to be irrelevant under the statute. We believe, however, that the Ohio statutory scheme can withstand this attack. The Ohio statutes, properly construed, permit the trial judge or panel to consider these factors at the mitigation hearing. Such a statutory construction is evident as R. C. 2929.04(B) states that "the death penalty . . . is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender" (emphasis added), one or more of the mitigating circumstances is established. This conclusion is buttressed by the requirement that these statutory provisions be liberally construed in favor of the accused.

As used in R. C. 2929.04(B)(2), the terms "duress"

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and "coercion" are to be construed more broadly than when used as a defense in criminal cases. See *State v. Woods* (1976), 48 Ohio St. 2d 127.

There was evidence in the psychiatric reports that appellant was perhaps easily led by Hall. When combined with appellant's age, it is conceivable that all characteristics could establish the mitigating circumstance defined by R. C. 2929.04(B)(2). However, we believe the panel was justified and correct in finding that this mitigating circumstance was not established by the evidence. Even if it were believed that appellant was apprehensive of Hall and was "forced" to go along with the crimes, the hard fact remains that appellant could have very easily quit the scheme while following in another car. Further, it must be remembered that appellant and Hall were engaged in the same type of scheme the very next day when Hall was arrested. We agree with the panel that, after considering all relevant factors, the second mitigating circumstance was not established.

The third and final mitigating circumstance in the statute concerns the offender's psychosis or mental deficiency. While rejecting appellant's claim that a minor defendant is *per se* "mentally deficient," we do hold that a defendant's age is a primary factor in determining the existence of a mental deficiency. Senility, as well as minority, may well be relevant, and therefore properly considered, in determining whether the offense was a product of mental deficiency.

The sum of the evidence and testimony of the psychiatrists, psychologists, probation department, school authorities and others fails to sustain appellant's position that he suffered from a mental deficiency. Appellant's situation was unpleasant but not unfamiliar: an unsatisfactory home, absence of family or other supervision, drug involvement, and inability to cope with school demands. Even when considered together with defendant's minority, all the factors do not establish a "mental deficiency" for purposes of R. C. 2929.04(B)(3). Although appellant's environment was in-

Syllabus.

deed undesirable, such conditions do not excuse or even mitigate aggravated murder. To hold otherwise would set a dangerous and misleading precedent for future defendants. We therefore agree with the panel and the court below that the aggravated murder was not the product of appellant's psychosis or mental deficiency, and therefore overrule appellant's tenth proposition of law.

Accordingly, the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

O'NEILL, C. J., HERBERT, CORRIGAN, STERN, CELEBREZZE and W. BROWN, JJ., concur.

THE STATE, EX REL. THE BEACON JOURNAL PUBLISHING COMPANY, APPELLEE, v. ANDREWS, REGISTRAR, APPELLANT.

[Cite as State, ex rel. Beacon Journal Pub. Co., v. Andrews (1976), 48 Ohio St. 2d 283.]

Public records—Registrar's documents—Considered public records—To be kept open for public inspection—Mandamus.

1. All documents in the possession of the Registrar of Motor Vehicles, including all abstracts of records required to be received by and maintained by the registrar pursuant to the provisions of R. C. 4507.40, are public records and shall be kept open at all reasonable times for inspection and, upon request, the registrar shall make copies of such records available at cost within a reasonable period of time.
2. The records of all proceedings of the Registrar of Motor Vehicles are required to be open to the public for inspection at all reasonable times.

(No. 76-104—Decided December 22, 1976.)

APPENDIX B

Opinion of the Court of Appeals, First Appellate District, Hamilton County, Ohio, not yet reported.

15008

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO, : NO. C-75068
Plaintiff-Appellee, :
vs. : O P I N I O N.
WILLIE LEE BELL, : FILED
Defendant-Appellant. : APR 17 1976
CLERK OF COURTS

APPEAL FROM THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Messrs. Simon L. Leis, Jr., Robert R. Hastings, Jr., and William P. Whalen, Jr., 420 Hamilton County Court House, Court and Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellee,

Messrs. Thomas A. Luken, 1003, First National Bank Building, 105 East Fourth Street, Cincinnati, Ohio 45202, and H. Fred Hoefle, 400 Second National Bank Building, 830 Main Street, Cincinnati, Ohio 45202, for Defendant-Appellant.

PALMER, J.

At about 11:00 P.M. on the evening of October 16, 1974, Julius Graber was discovered by police lying in Spring Grove Cemetery in Hamilton County, Ohio, critically injured from a shotgun wound at the back of his head. He expired in the ambulance on the way to the hospital. Approximately one week thereafter, the defendant-appellant, Willie Lee Bell, then a minor of 16 years of age, was arrested together with one Samuel Hall, an adult, for the murder of Julius Graber. Following proceedings in the Juvenile Division, not here in issue, Bell was bound over to the Hamilton County Grand Jury

and was jointly indicted with Hall on two counts of aggravated murder contrary to R. C. 2903.01, with specifications of aggravated robbery and of kidnapping, and on separate counts of aggravated robbery and kidnapping. Counsel was assigned the indigent Bell, and pleas of not guilty and not guilty by reason of insanity were entered.

In subsequent proceedings, the trial court found Bell to be sane and competent to stand trial, overruled a motion to suppress an inculpatory statement, and accepted Bell's waiver of trial by jury and request to be tried by a three-judge panel. Trial then ensued, separate from that of Hall, at the conclusion of which the court unanimously found Bell guilty of aggravated murder as charged in the second count of the indictment, and guilty of the specification to the second count, viz., that the aggravated murder was committed while Bell was committing kidnapping. He was also found guilty of the third and fourth counts of aggravated robbery and of kidnapping, respectively. Following pre-sentence and psychiatric examinations, a hearing on mitigating circumstances was held by the panel pursuant to R. C. 2929.03 et seq., at the conclusion of which the panel unanimously found that none of the mitigating circumstance specified in R. C. 2929.04(B) had been established by a preponderance of the evidence. Sentence, including death by electrocution, was then pronounced and entered.

Appeal was timely filed, and counsel provided for appellant to prosecute this appeal. Nine assignments of error are presented, have been vigorously argued, and will be discussed serially infra, following a review of such of the evidence produced during the trial and antecedent proceedings as is necessary to provide a

fundament for the disposition of the various questions of law raised thereby.

The record reveals a body of evidence adduced on behalf of the State, resulting from the testimony of some 20 witnesses and including the recorded statement of Bell, which tends to establish the following series of events. Earlier in the evening of October 16th, Bell and Hall had met at a youth center in Cincinnati to thereafter leave for Hall's home, where the latter borrowed his brother's Grand Prix Pontiac. After briefly stopping at a White Castle restaurant, the two proceeded to Victory Parkway, falling in column behind a 1974 blue Chevrolet. When the Chevrolet turned into a parking garage, Hall, driving his brother's car, did the same, to follow the leading vehicle to the second floor of the garage. After the Chevrolet was parked, Hall got out of the Pontiac with a 12 gauge "sawed off" shotgun and accosted the Chevrolet's driver, who proved to be Mr. Graber, the 64 year old director of the Glen Manor Home for the Aged. Graber was forced into the trunk of his own vehicle, and Hall drove their unwilling passenger, with Bell following in the Pontiac, to Dana Avenue, where the Pontiac was then parked. Bell next entered Graber's Chevrolet and began driving it in the direction of Spring Grove Cemetery. At shortly before 11:00 P.M., Bell drove past an entrance to the cemetery, stopped and reversed directions, and backed the Chevrolet up a lane inside the cemetery premises.

At this point, one Robert Pierce, a resident of an apartment building on Groesbeck Avenue, near the cemetery, had just returned from work and was sitting in the parking lot of his building in his automobile listening to the conclusion of a baseball game. Through

opened windows, he observed a vehicle stopped in the cemetery with its parking lights on. He then heard two car doors close, one after another, turned his radio down to listen, and heard a voice screaming "Don't shoot me; don't shoot me." He turned his radio off, and shortly thereafter heard one shot, followed after an interval by a second shot. He then saw a man enter the parked car on the passenger side to place himself behind the wheel. He heard two car doors closing, saw the parking lights extinguished, and watched the car proceed, without lights, out of the cemetery and onto Gray Road and away. At about 11:00 P.M. this witness called the police, who shortly thereafter discovered Mr. Graber, with the results heretofore related.

After Graber had been pronounced dead at the hospital, his body was removed to the morgue, where attendants discovered that he had secreted money and other valuables in his shoes. A post-mortem examination revealed that death had resulted from a wound at the rear of the head delivered by a shotgun held at near-contact range. Numerous pellets of #5 shot were removed from the body, and testimony was received that the wounds, to hand and head, were consistent with the fatal shot having been delivered while Graber's hands were clasped behind his head.

Following the fatal incident, Hall and Bell drove to Dayton, Ohio, where they spent the night in the Graber Chevrolet. The next morning, with Bell driving, they stopped at a service station in Dayton where they made certain inquiries of the attendant, one Kenneth Hardin, about finding work. After conversation, Bell and Hall left, but returned following a short interval. Hall then thrust a shotgun at Hardin, relieved him of the keys to his auto-

mobile, forced Hardin into its trunk, and drove it away from the station. Bell followed in Graber's Chevrolet. The Hardin car, however, was stopped by a State Highway Patrolman for a defective muffler, and when Hardin pounded on the trunk lid, he was released by the officer. Hall was arrested and the shotgun removed from the vehicle's front seat. Bell, meanwhile, who still was following in the Graber Chevrolet when Hall was stopped, proceeded back to Cincinnati to abandon the Chevrolet on Beatrice Avenue (near his own residence on Preston Avenue) to which he then returned.

Approximately one week later, following the interrogation of Hall by officers of various police departments and other investigative effort, Cincinnati police appeared at the Bell residence. Bell was taken to police headquarters to answer questions in connection with the Hall investigation and, when the answers to preliminary questions indicated a possible connection with Hall, was given the first of several *Miranda* warnings. Bell was asked to make a recorded statement and instructed, in connection therewith, that he could have his mother present with him when he made any statement, if he so desired. Although Bell declined, the officer nevertheless called his mother to tell her that her son was involved in a homicide, kidnapping and robbery with Hall, and that he was going to be charged with the offenses. An offer was made to transport her to headquarters to be with her son when he made his statement. She declined to come to headquarters.

A statement was then taken from Bell, to eventually be received into evidence. It confirmed most of the factual details related above, but denied any intention of Bell to take part in a homicide. Bell conceded his presence during the kidnapping of Graber, but

said he did not know of the presence of the shotgun until Hall got out of the Pontiac to threaten Graber with the weapon. He conceded driving Graber's vehicle to the cemetery and backing up into the cemetery lane, but insisted that it was Hall who removed Graber from the trunk, and Hall who took him "in the bushes and I heard a shot and I heard this man crying, telling Sam, 'Don't shoot anymore.' " T. p. 340. After the first shot, according to Bell, Hall ran back to the vehicle to get another shell for the shotgun and then returned to the bushes, whereupon Bell heard the second shot. Hall then drove the pair, according to the statement, to Dayton where the incident with the service station operator occurred. Bell attributed the active part of these proceedings to Hall, but admitted following Hall in Graber's Chevrolet while the two vehicles were driven some 20 minutes before Hall was stopped by the highway patrolman.

Additional expert testimony identified a shell casing found at the scene of the homicide as having been fired from the shotgun found on Hall at the time of his arrest in Dayton, and identified a latent fingerprint from the outside window on the driver's side of the Graber vehicle as being that of Bell.

The defense offered only one witness, a Columbus police officer who had interrogated and had taken several statements from Hall. The statements were not, however, offered into evidence, and the case went to the panel on the basis of the evidence presented by the State.

I.

The first three assignments of error challenge the constitutional validity of the Ohio death penalty provisions, and are

phrased as follows:

I. Imposition of the punishment of death is in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States, since it constitutes cruel and unusual punishment.

II. The trial court erred in overruling the "Motion for an Order Declaring the Death Penalty Unconstitutional, Dismissing the Specification of Aggravating Circumstances from the Indictment and Sentencing Defendant to Life Imprisonment for His Conviction of Aggravated Murder."

III. The death penalty to which appellant was sentenced offends contemporary standards of decency and constitutes cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the Constitution of the United States.

The first two of these concededly raise questions which are for all practical purposes identical, were therefore argued together, and will be similarly treated here. Appellant urges, under these assignments, that the Ohio death penalty provisions failed to cure the infirmities found by at least three of the Justices constituting the majority of the United States Supreme Court in *Furman v. Georgia*, 408 U.S. 238 (1972) to fatally infect similar legislation and that the Ohio statutory scheme for the punishment of murder contained in R. C. 2929.02 et seq., enacted effective January 1, 1974, failed to eliminate those elements of arbitrary, rare, and discriminatory application which call down the prohibitions of the Eighth and Fourteenth Amendments. Appellant points, among other things, to the continuing presence of such variable elements as grand jury discretion to indict for a capital or non-capital version of the same offense, prosecutor discretion in bringing matters to the grand jury and in plea-bargaining proceedings thereafter, discretion in the Juvenile Division in whether it elects to retain or abjure jurisdiction over a juvenile offender, judicial discretion in finding the presence or absence of aggravating

circumstances and/or mitigating circumstances under R. C. 2929.04 (A) and (B), and, finally, discretion in the exercise of executive clemency.

The third assignment of error argues the per se invalidity of the death penalty under the Eighth and Fourteenth Amendments, urging us to adopt the view that "contemporary knowledge and standards of decency" have demonstrated the "inutility" of the measure as a detriment to crime, and have manifested a more sophisticated approach to the retributive aspects of punishment, as well as a greater knowledge of the possibilities of rehabilitation. These and other factors, argues the appellant, have led to a growing reluctance to resort to this last enormous and irreversible step, a reluctance which, given the progressive non-static nature of the concept of "cruel and unusual punishment," has finally succeeded in the last half of this century in bringing that mode of punishment within the prohibition of the Amendment.

This argument, while not lacking in legal or humanitarian interest, fails on several grounds, it seems to us. First, it is difficult indeed to derive comfort from the Eighth Amendment as the source of an implied constitutional prohibition of the death penalty, when both the Fifth and Fourteenth Amendments expressly contemplate and forgive its use when accompanied by due process of law:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . nor shall any person. . . be deprived of life. . . without due process of law. . . .

. . . nor shall any State deprive any person of life . . . without due process of law

To similar effect, see Sections 9 and 10, Article I of the Ohio Constitution.

Secondly, we are unable to derive any dispositive or even persuasive support for this argument from the final arbiters of all such arguably problematical constitutional language, the United States Supreme Court. In the *Furman* case, only two of the nine Justices stated unequivocal support for the proposition here advanced by appellant; the balance of the Justices either supported the constitutionality of the death penalty legislation in question, or found it lacking in detail but not necessarily in principle. Historically, of course, the appropriate use of the death penalty has judicial approbation. As Mr. Justice Douglas remarked in *Furman*:

It has been assumed in our decisions that punishment by death is not cruel, unless the manner of execution can be said to be inhuman and barbarous. *In re Kemmler*, 136 U.S. 436, 447.

408 U.S. at 241.

See also *Wilkerson v. Utah*, 99 U.S. 130, (1878); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947).

In sum, the arguments (and examples) offered by appellant to sustain his first three assignments of error are indistinguishable from those made to us and rejected by us in the recently decided cases of *State v. Reaves*, No. C-75022 (1st Dist., January 26, 1976) and *State v. Woods*, No. C-75047 (1st Dist., January 26, 1976), and require overruling on authority thereof. We note, in passing, the similar result reached by the Court of Appeals for Franklin County, Ohio, in *State v. Harris*, No. 74AP-580, decided June 10, 1975, and *State v. Royster, aka Shaw*, No. 75AP-195, decided August 26, 1975, both unreported, and cite with approval the language of Judge Whiteside in his concurring opinion in the *Harris* case:

Regardless of one's personal views as to whether the death penalty should be used as punishment for crime, the

only conclusion consistent with the Constitution itself is that the death penalty is not *per se* unconstitutional, and that the Legislature has the power to provide for the imposition of the death penalty so long as the means of imposition, the manner of determining when it is to be imposed, and the offenses for which it is imposed are neither discriminatory nor constitute cruel and unusual punishment. The mandatory Ohio death penalty, limited in its application to only the most serious types of aggravated murder, and predicated upon detailed factual determinations both as to guilt and mitigating circumstances, meets the constitutional test so as to neither be discriminatory nor constitute cruel and unusual punishment.

The first three assignments of error are overruled.

II.

The appellant's fourth assignment of error is phrased as follows:

IV. Appellant was unconstitutionally coerced into waiving his right to trial by jury by the provisions of §§ 2929.03 and .04, R. C.

The argument here proceeds from the factual circumstance providing for the separation, under the Ohio statutes, of the trial to determine guilt pursuant to R. C. 2903.01 and 2929.03, from the trial to determine the penalty pursuant to R. C. 2929.03 and .04. The determination of guilt of both the offense and the specification of aggravating circumstance is by verdict of a jury unless waived in writing by the defendant, in which event it is by verdict of a three-judge panel. If a jury is not waived, the determination of penalty is made by the trial judge who presided over the jury trial. If, however, a jury is waived, the penalty is determined by the three judge panel which determined his guilt, under the following procedure:

...if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of Section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.
R. C. 2929.03 (E) (Emphasis added).

Thus, if the defendant succeeds in convincing only one of the three judges on the panel that one or more of the mitigating circumstances listed in R. C. 2929.04(B) has been established by a preponderance of the evidence, the defendant will escape a sentence of death, as opposed to the argued greater difficulty in so convincing a single sentencing judge. This circumstance, argues the appellant, impels him to select trial by panel rather than trial by jury; the dread of a death sentence is so overwhelming in its compulsion, argues appellant, that it carries all other considerations before it, including what would otherwise constitute a clearly favorable and generally dispositive consideration, viz., the necessity of determining guilt beyond a reasonable doubt by the unanimous verdict of twelve jurors.

Clearly, the creation of a statutory scheme which deliberately, or effectively, even where unintended, discouraged or chilled to any substantial degree the undoubted right of a citizen of this State or of the United States to trial by jury of a criminal offense of the instant magnitude, could not constitutionally be tolerated. In *United States v. Jackson*, 390 U.S. 570 (1968) relied upon by appellant, the United States Supreme Court had before it a federal statute (18 U.S.C. § 1201(A)) which it determined to have precisely such discouraging effect. There, however, the statute providing punishment for conviction of kidnapping made the death penalty possible where trial was by jury, but unavailable where trial was by the court.¹ As was appropriately pointed out by Mr. Justice Stewart, speaking for the Court:

One fact at least is obvious from the face of the statute itself. . . the defendant's assertion of the right to jury trial may cost him his life, for the federal statute authorizes the jury - and only the jury - to return a verdict of death.

390 U.S. at 572.

His waiver of trial by jury, on the other hand, and without more, spared his life. No such dramatic and compelling dichotomy is present in the statutes under review. Death is possible under either alternative, and it may be avoided under both alternatives under the Ohio statutes. Unlike *Jackson*, it is only in the arguably greater possibility of avoidance of death growing out of the requirement of unanimity within the panel, and not to its absolute avoidance, that appellant may find any comfort in R. C. 2929.03(E). Presumably, and paradoxically, appellant would find no constitutional flaw if the statute required the three judge panel to unanimously find the presence of a mitigating factor before it could avoid imposing death; but it may reasonably be doubted that this logic would in truth commend itself to the defendant anymore than it did to the General Assembly.

We do not, for these reasons, find *Jackson* to be controlling or persuasive authority for the question at issue. However, we do not wish to be understood as holding that a penalty or other statute which strongly inclined rather than actually coerced a defendant into waiving his right to a jury trial, would escape the most searching scrutiny as to constitutional rectitude. There are obviously more ways of inducing conduct than bludgeoning someone over the head; statutes may be subtly as well as patently offensive. Were we, therefore, able to conclude from our reading of the statutes in question, or from our experience in dealing with them, that they were so designed, or that they so worked in practice, as to persuasively incline or induce a defendant toward a waiver of the constitutional right to trial by jury that he would otherwise be completely free to enjoy, we could follow appellant's argument with

greater ease. Such does not appear to be the case here.

First, since our attention is focused by appellant's argument upon the greater possibility of convincing one out of three judges of the existence of mitigating factors than one judge alone, it seems entirely appropriate to note that there is also a greater possibility of convincing one or more out of twelve jurors of the absence of evidence of guilt beyond a reasonable doubt, than so convincing one out of three judges of the same fact. If the first factor inclines against a jury trial, the latter inclines toward it. The balance struck by these competing considerations is one for the judgment of competent trial counsel; we find no unfair tilt toward the latter which would require us to determine that the statutes unconstitutionally chill the right to trial by jury.

Second, we are reinforced in our above analysis by actual experience with the statutes since they became effective January 1, 1974. Thus, since January 1, 1974, there have been a total of 11 indictments for aggravated murder with specifications of aggravating circumstances in Hamilton County. Of this total, 7 were set for trial by jury, and only 4 of the 11 proceeded to trial before a three judge panel pursuant to waiver of jury trial. This scarcely suggests the existence of any substantial coercion or statutory tilt toward inducing jury waivers; to the contrary, it suggests that the balance referred to, *supra*, is still judged to lie on the side of twelve jurors determining the issue of guilt. The fourth assignment of error is overruled.

III.

The fifth assignment of error challenges the overruling of appellant's motion to suppress his inculpatory statement and its

subsequent admission into evidence. The issue raised here is not as to the timing or adequacy of the *Miranda* warnings to Bell, since they were given early, frequently, and correctly, but rather derive from what is conceived to be Bell's special status as a minor.²

Appellant challenges these rulings on the ground that a minor has the constitutional right to have the warnings mandated by *Miranda v. Arizona*, 384 U.S. 436, given to his parents as well as to himself before a statement could be taken and used against him, that he had a right to consult with parents and counsel before having to decide whether to waive his *Miranda* rights, and that he had a right to be told, and for his parents to be told, that the possibility existed that the statement might be used in an effort to kill him in the electric chair. In the absence of such warnings made to such persons, and their intelligent and knowing waiver by all such parties, his statement is involuntary and inadmissible.

Appellant's brief at 32.

It will be recalled that the interrogating officer who took the statement from Bell testified that he first informed him that he could have his mother present while he made his statement (T. p. 73, 74, 107), and further asked her if she would like to be present when he gave the statement. The mother declined the offer of transportation to headquarters, declined the opportunity to be present at the interrogation, and Bell himself again declined to have his mother present when he was informed of this conversation. T. p. 73. After satisfying himself that appellant could read, and had in fact read the card waiving his *Miranda* rights, and that he understood the written and verbal recital of his constitutional rights and had no questions with respect thereto, the interrogating officer took the statement.

We conclude from our review of the record that of the multiple events appellant would attach as conditions precedent to the receipt of incriminating statements from minors -- and without commenting or ruling on the propriety or necessity thereof -- only two may be said to have been absent in the instant case: no *Miranda* warnings were given to the mother; and no one told her that her son stood in possible jeopardy of the death penalty.³

Appellant concedes that neither proposition has support in Ohio authorities, and has cited to us no case from any jurisdiction lending support to the latter proposition, which we find to be without merit. Whatever duty the officer had to communicate with Bell's mother, he concededly did so before taking Bell's statement and told her that her son was being held in connection with a homicide, an armed robbery and a kidnapping. This was the sum of the officer's knowledge at that point and was fairly communicated to the mother, who nevertheless declined personal involvement in the interrogation. Any further advice by the officer as to a possible death penalty would have been the purest speculation on his part, since Bell did not actually stand in jeopardy thereof until indictment by the Grand Jury on a charge of aggravated murder with a specification of an aggravating circumstance. Moreover, we are given no reason to assume that a mother who is unmoved by the litany of heinous charges against her son, as related to her by the officer, will be moved by a recital of possible penalties, even the ultimate penalty.

We are left then with the question of whether *Miranda v. Arizona*, 384 U.S. 436 (1966) and its progeny dictate that the parents of a minor shall be given a reading of constitutional rights along with their child and whether, by extension, both are then required

to intelligently and voluntarily waive those rights as a condition to the constitutional competence of inculpatory statements from the minor. We find nothing in *Miranda* which could dictate that result, although it may be conceded that when a minor is sought to be interrogated, the question of whether he knowingly and willingly waives constitutional rights cannot always be decided by the same criteria applied to mature adults. Cf. *Haley v. Ohio*, 332 U.S. 596 (1948); *In re Gault*, 387 U.S. 1 (1967). Thus, we have no quarrel with the language of the United States District Court in *United States ex rel. B. v. Shelly*, 305 F. Supp. 55 (E.D.N.Y. 1969), relied upon by appellant:

Maturity is obviously a factor in assessing understanding, whether a confession. . . or *Miranda* rights are involved. . . . While *In re Gault*, 387 U.S. 1 (1967). . . has not made a relinquishment of constitutional rights by a juvenile in the absence of parents or adult friends impossible, it teaches us to be cautious in finding a meaningful waiver by a lone child.
Id. at 58.

Nor would we question the wisdom of Judge Weinstein's further comment in *Shelly* that:

Where a child is involved, a period to compose himself and to obtain the assistance of a mature adviser must be granted if there is to be any assurance that he knowingly waived vital constitutional rights. . . .
Id. at 59-60.

However, we can find nothing in the instant record which would violate any of these precepts. Bell was, in fact, afforded the opportunity to consult with a lawyer or with his mother, and did, in fact, have a period to compose himself while the officer consult with his mother. There is nothing in the record of this case bearing any remote resemblance to the assault by officialdom on a "frightened and tired" child that worked the impermissible conduct in *Shelly*. Cf. *State v. White*, 494 S.W. 2d 687 (Mo. App. 1973).

Indeed, we are impressed with the meticulous care with which the police approached the rights of Bell, and which surrounded the taking of the statement, and are unable to conclude that the statement was given in other than a willing and knowing fashion by a subject who, though a minor, was both reasonably intelligent and knowledgeable, and who thoroughly understood and voluntarily and intelligently waived his constitutional rights, including any right to the presence of a mature advisor.

To the extent that *Lewis v. State*, 288 N. E. 2d 138, 142 (Ind. App. 1972) seems to hold (in addition to the criteria outlined above and found present here) that "a juvenile's statement or confession cannot be used against him at a subsequent trial or hearing unless both he and his parents or guardian were informed of his rights to an attorney, and to remain silent," we decline to follow such rule. We also note that in the *Lewis* case, unlike our own, the juvenile's mother was not contacted until after the confession was taken (although that factor would not seem to affect the broadly stated Indiana rule as quoted above). We hold, therefore, that where the State has satisfied its undoubted burden of proving that an inculpatory statement by a minor was voluntarily made pursuant to an intelligent and willing waiver of constitutional rights concerning which he was fully advised, under circumstances demonstrating due regard for the fact that the tender years of the accused require an even more scrupulous attention to the foregoing issues of voluntariness and understanding than in the case of an adult, the overruling of a motion to suppress such statement and its subsequent introduction into evidence was not error simply because the police neglected or declined to charge the mother, or other

mature advisor, with the accused's *Miranda* rights.

Appellant's fifth assignment of error is overruled.

IV.

Appellant's sixth assignment of error asserts that the finding of guilt was contrary to law and to the manifest weight of the evidence, and is predicated on the argued absence of evidence that Bell participated in the actual killing of Graber, or in the planning of it. From this, appellant argues that Bell's connection with the crime of homicide was, at best, as an aider and abettor of Hall's crime, and that absent evidence that Bell advised, hired, incited, commanded, counselled, and intended the murder, he may not be convicted therefor. We disagree.

First, we do not agree that there was no credible evidence from which the court could have concluded that Bell participated in the killing. It must be conceded that Bell was intimately involved in the kidnapping and armed robbery; his own statement confirms it. Further, the evidence of Bell's own statement shows that he drove the car into the deserted cemetery and that he asked his companion: "What was we going to do now?" T. p. 340. Further, against Bell's statement that he remained in the car while his companion Hall released the victim from the trunk, took him into the woods, shot him the first time, returned to the car for another shell, reloaded the gun and then returned to shoot the pleading Graber yet a second time, we have the evidence of the witness, Pierce, who distinctly heard two car doors slam before the shots, and two car doors open after the shots. Moreover, the court was not required to believe that Graber lay supinely with his hands behind his head while his assailant left him alone to return to the

car to reload his gun. Evidence of bruises about the body of Graber the comment of Bell to Hall, the physical circumstances surrounding the slaying, and the testimony of Pierce, all would have justified the trier of fact in disregarding Bell's version of the killing and in concluding that Bell either committed or, actively assisted Hall in murdering the victim.

Additionally, even if Bell's version of the slaying had been accepted by the court, i.e., that he remained in the car while Hall murdered the victim of their joint kidnapping and armed robbery venture, we do not understand the law of this State to dictate Bell's acquittal of the charge of aggravated murder. One may aid and abet the commission of a crime without being physically present when it is committed. *Browning v. State*, 21 Ohio L. Abs. 218 (1935); 15 O Jur 2d CRIMINAL LAW § 52. There is abundant credible evidence, already reviewed herein, to have permitted the triers of fact to conclude that Bell well knew the probable outcome of the encounter in the cemetery woods between his armed companion and the victim. Had simple robbery or ransom been the principal motive, the circumstances of the trio's presence in the cemetery would have been without purpose and the slaying utterly pointless; these facts could not have escaped Bell's attention. Yet-- crediting his own story-- he participated in the abduction, drove the car to the scene of the murder, sat by awaiting what he must have known would be a killing, and assisted in the escape. That evidence alone is sufficient to sustain the court's finding of guilt, for clearly, under the applicable statute, one who aids and abets another in committing an offense is guilty of the crime of complicity and may be prosecuted and punished as if he were the principal offender.

R. C. 2923.03(A)(2). It is not challenged that the charge may be stated in terms of the complicity statute, or in terms of the principal offense, as here. R. C. 2923.03(F). We hold that the court did not err in determining Bell's guilt, either as a principal in the murder, or as an aider and abettor in the slaying; the evidence is sufficient to sustain either theory. Appellant's sixth assignment of error is overruled.

V.

The seventh assignment of error asks us to find prejudicial error in the refusal of the trial court to strike testimony of certain witnesses for the State whose intended presence (and/or criminal records) were not earlier made known to appellant pursuant to requests for discovery. We find this assignment of error totally without merit. In most of the instances complained of, the State was either not in possession of the information in advance of trial, or had orally transmitted it to appellant's counsel as it became available during the course of the proceedings. In each instance, the trial court made careful inquiry of possible prejudice to the appellant, and concluded that none existed. We agree. The assignment of error is overruled.

VI.

Next, appellant asserts that the finding of the panel that appellant had not met his burden of proof during the "penalty trial" as to the presence of one or more mitigating factors was contrary to the manifest weight of the evidence and contrary to law. The thrust of appellant's argument here is addressed to the third mitigating circumstance contained in R. C. 2929.04(B)(3), to wit:

The offense was primarily the product of offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

Appellant concedes that there is no suggestion of psychosis to be found in the record, but relies on the argued presence of "mental deficiency," per se. Hereunder, he is faced with the unanimous opinion of the three psychiatrists who examined him after the determination of guilt, and in connection with the penalty proceedings, that he was neither psychotic nor mentally deficient, nor that the offense was the product of either of these conditions. To the contrary, Bell was found to be "very sharp," to have an estimated I.Q. of 110-120, which would be above average, to have played chess while in jail with sufficient skill to rank as the first or second-best player there. He was, however, found to be "easily led" and "there was strong motivation to follow along with Mr. Hall." T. p. 542.

The findings of the psychiatrists after trial varied somewhat from their earlier conclusions, when they had determined Bell to be competent to stand trial. At that time, his I.Q. was determined to be about 90, he appeared subdued and "not. . .capable of much remorse." Although found to be fully in contact with reality and not suffering from "mental defect or mental illness," he was not "able to fully appreciate the gravity of the situation that he was in -- the seriousness of the overall situation." He was probably less "mature" than the average 16 year old, but fully capable of understanding the trial process and of assisting in his defense. T. p. 11-12.

This apparent lacunae, however, is filled by further examination of this record. The difference between the two findings was attributed by the psychiatrists to the improvement in living conditions brought about by being in jail over Bell's previous unconfined

experience, and particularly in the absence of hallucinogens (mescaline):

BY MR. NECHLEY:

Q. Just briefly, doctor. I think you probably already answered it, but I notice some distinctions between your first report on the 30 and your subsequent report on the 23, and I believe you said that this may have been the result of the fact that he was still under the influence of drugs on the 30, or perhaps coming out of that.

A. No. I didn't mean to imply that, but I think, being in prison for this period of time and being away from drugs and being regular in his living situation, he seemed a lot clearer, a lot more tuned-in; perhaps the focus of the second examination was a little different, too.

Q. So that it is a fact that, assuming one had been on drugs, assuming one had been drugged during that particular time, that the longer one could keep them off drugs, assuming a good diet and assuming a standard, ritual routine, assuming sometime later, 60 days, 80 days, 100 days, one would get a better report, a better idea of how they are handling themselves at that time?

A. Should, yes.

T. p. 543-44.

The sum of the evidence and testimony of the psychiatrists, psychologists, probation department, school authorities, and others thus fails to sustain appellant's position. The picture one derives is unpleasant but not unfamiliar -- an unsatisfactory home, absence of familial or other supervision, involvement with drugs, inability to cope with school demands, and so on. While appellant's history is one from which the social psychologist may arguably find a degree of exculpation, it nowhere rises to the level of proof required to establish an R. C. 2929.04(B)(3) circumstance. The offense was simply not shown to be the product of mental deficiency and the panel did not err in so finding, or in finding that appellant did not meet his burden of proof during the penalty trial generally. Appellant's eighth assignment of error is overruled.

VII.

Next, in his ninth and final assignment of error, raised by leave after submission of briefs and oral arguments, the appellant asserts that the trial court was without jurisdiction to hear the cause by reason of double jeopardy, namely, that Bell had previously been subjected to a hearing in the Juvenile Division on the identical offenses for which he was herein indicted, tried and convicted. Appellant's theory rests on the cases of *Breed v. Jones*, 421 U.S. 519, 95 S. Ct. 1779 (1975) and *Brenson v. Havener*, 403 F. Supp. 221 (N.D. Ohio 1975), wherein juveniles had been adjudicated delinquents before being bound over for trial as adults on identical offenses. These cases, however, are factually inapposite to the cause before us, and the argument is not well taken.

Thus, in the instant matter, the transcript of the docket reveals that while Bell had indeed been the subject of a hearing in the juvenile division, said proceeding was the non-adjudicatory probable cause hearing prescribed by R. C. 2151.26,⁴ a procedure designed to protect the juvenile, and a procedure wherein the merits are not reached. Cf. *In re Winship*, 397 U.S. 358, 367 (1970); *State v. Carmichael*, 35 Ohio St. 2d 118, cert. den. 414 U.S. 1161 (1974).

Accordingly, it is plain, and we so hold, that where a juvenile offender is subjected to no more than the statutory probable cause hearing under R. C. 2151.26 before his bind-over to the court of common pleas to be tried as an adult, and where, as here, there is no adjudication of delinquency in consequence of said probable cause determination, jeopardy does not attach and there is no impediment thereafter to the common pleas court's taking of jurisdiction. The assignment of error is overruled.

The judgment is affirmed.

SHANNON, P. J. and WHITESIDE, J., CONCUR.

WHITESIDE, J. OF THE TENTH APPELLATE DISTRICT SITTING BY ASSIGNMENT IN THE FIRST APPELLATE DISTRICT OF OHIO.

1. This statute. . . creates an offense punishable by death "if the. . . jury shall so recommend." The statute sets forth no procedure for imposing the death penalty upon a defendant who waives the right to jury trial or upon one who pleas guilty. 390 U.S. at 571.
2. Bell's birth date was December 12, 1957; he was therefore two months short of 17 when the homicide occurred.
3. An additional "condition" which appellant argues, that the appellant and/or his parents must be advised that the Juvenile Division "had the power to relinquish jurisdiction and order him tried as an adult," we reject as meritless. No authority is cited in support of such proposition, and no reason for its adoption commends itself to us.
4. See Entry of November 4, 1974, *In re Willie Lee Bell*, J. C. 74-08044, Hamilton County Court of Common Pleas, Juvenile Division.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Opinion.

Appendix C

- C-1: Order affirming judgment of Court of Appeals, and setting new date for execution by the Ohio Supreme Court, December 22, 1976
- C-2: Mandate of the Ohio Supreme Court, December 22, 1976
- C-3: Order denying Petition for rehearing, January 14, 1977
- C-4: Order of the Ohio Supreme Court staying execution of sentence pending review by the United States Supreme Court.

SC-3

Samuel H. Harrison, President, Hamilton, Ohio

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

1976 TERM

To wit: December 22, 1976

The State of Ohio,
Appellee,

No. 76-499

APPEAL FROM THE COURT OF
APPEALS

Willie Lee Bell,
Appellant.

for HAMILTON County

This cause, here on appeal from the Court of Appeals for HAMILTON County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed, for the reasons set forth in the opinion rendered herein and it appearing to the Court that the date heretofore fixed for the execution of the judgment and sentence of the Court of Common Pleas is now past, this Court proceeding as required by law does hereby fix the 22nd day of February, 1977, as the date for carrying said sentence into execution by the Superintendent of the Southern Ohio Correctional Facility, or in his absence by the Assistant Superintendent, in accordance with the statutes in such case made and provided.

It is further ordered that a certified copy of this entry and a warrant under the seal of this Court be duly certified to the Superintendent of the Southern Ohio Correctional Facility and the Superintendent make due return thereof to the Clerk of the Court of Common Pleas of Hamilton County,

and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the COMMON PLEAS COURT to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for HAMILTON County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court

this day of 19

Clerk

Deputy

NOTED
CITY
JAN 14 1977

BEST COPY AVAILABLE

BARRY BOOTHMAN, PRESIDENT, BRIDGEVILLE, OHIO

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, }
 City of Columbus }
 The State of Ohio,
 Appellee,
 vs.
 Willie Lee Bell,
 Appellant.

1976 TERM

To wit: December 22, 1976

No. 76-499

MANDATE

To the Honorable, COMMON PLEAS COURT
 Within and for the County of HAMILTON, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to
 carry the following judgment in this cause into execution:

Judgment of the Court of Appeals affirmed for the reasons set forth
 in the opinion rendered hereby.

It is further ordered that the execution date be set for Tuesday,
 February 22, 1977.

THOMAS STARTZMAN,
 Clerk

1977

Deputy

RECORD OF COSTS

Docket Fee \$	Paid by Affidavit of Poverty
Docket Fee \$	Paid by
Docket Fee \$	Paid by
Printing Record \$	Paid by
Supplemental Record \$	Paid by
Sheriff's Costs \$	Paid by
Sheriff's Costs \$	Paid by

SC-18

BARRY BOOTHMAN, PRESIDENT, BRIDGEVILLE, OHIO

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, }
 City of Columbus. }

1977 TERM

To wit: January 14, 1977

State of Ohio,
 Appellee,

vs.

Willie Lee Bell,
 Appellant.

No. 76-499

REHEARING

It is ordered by the court that rehearing in this case is denied.

FOR YOUR
 INFORMATION
 ONLY
 NOT FOR FILING

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio,
 do hereby certify that the foregoing entry was correctly copied from the records of

said Court, to wit, from Journal No. Page

IN WITNESS WHEREOF, I have hereunto subscribed
 my name and affixed the seal of the Supreme Court
 this 14th day of January, 1977.

THOMAS L. STARTZMAN, Clerk.

By Deputy.

THE STATE OF OHIO, }
City of Columbus. }

19.77 TERM

To wit: January 14, 1977

State of Ohio,
Appellee,

No. 76-499

vs.
Willie Lee Bell,
Appellant.

ENTRY

(HAMILTON COUNTY)

Upon consideration of the motion, filed by counsel for appellant, to stay execution of sentence pending the timely filing of an appeal to the Supreme Court of the United States, it is therefore

ORDERED that execution of sentence be, and the same hereby is, stayed, pending the timely filing of an appeal to the Supreme Court of the United States.

It is further ORDERED that if a timely notice of appeal is filed to the Supreme Court of the United States, this stay will automatically continue pending final determination of the appeal by that Court.

It is further ORDERED that the Clerk of this Court shall forthwith send a certified copy of this Stay of Execution to the Superintendent of the Southern Ohio Correctional Facility, who shall acknowledge receipt thereof.

C. William Phil
CHIEF JUSTICE

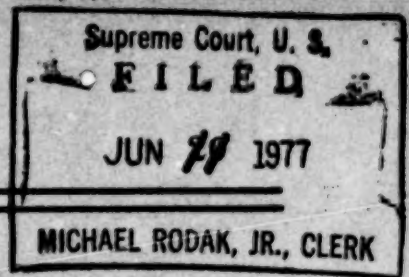
I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. Page

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 14th day of January, 1977

THOMAS L. STARTZMAN Clerk.

By _____ Deputy.

APPENDIX



Supreme Court of the United States
OCTOBER TERM, 1977

No. 76-6513

WILLIE LEE BELL,

Petitioner

—vs.—

THE STATE OF OHIO,

Respondent

**ON WRIT OF CERTIORARI TO THE SUPREME
COURT OF THE STATE OF OHIO**

**PETITION FOR CERTIORARI FILED APRIL 6, 1977
CERTIORARI GRANTED JUNE 27, 1977**

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-6513

WILLIE LEE BELL,

—vs.—

THE STATE OF OHIO,

Petitioner

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME
COURT OF THE STATE OF OHIO

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A. RELEVANT DOCKET ENTRIES

1. *Trial Court—Court of Common Pleas*

BIND-OVER ENTRY, 11-4-74

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS
JUVENILE DIVISION

J.C. 74-08044

ENTRY

IN RE:

WILLIE LEE BELL

THIS CAUSE CAME ON THIS DAY TO BE HEARD, AND THE COURT AFTER FULL INVESTIGATION AND AFTER A MENTAL AND PHYSICAL EXAMINATION FINDS THAT THE ACT ALLEGEDLY COMMITTED BY WILLIE LEE BELL WOULD BE A FELONY IF COMMITTED BY AN ADULT.

THE COURT FURTHER FINDS:

1. WILLIE LEE BELL WAS SIXTEEN (16) YEARS OF AGE AT THE TIME OF THE CONDUCT CHARGED.

2. THERE IS PROBABLE CAUSE TO BELIEVE THAT THE CHILD COMMITTED THE ACT ALLEGED.

THE COURT FURTHER FINDS AFTER DUE CONSIDERATION OF (1) THE CHILD'S AGE; (2) THE CHILD'S PRIOR JUVENILE RECORD; (3) THE EFFORTS PREVIOUSLY MADE TO TREAT OR REHABILITATE THE CHILD; (4) THE CHILD'S FAMILY ENVIRONMENT; (5) THE CHILD'S

SCHOOL RECORD; (6) AFOREMENTIONED MENTAL AND PHYSICAL EXAMINATION OF THE CHILD, THAT THERE ARE REASONABLE GROUNDS TO BELIEVE THAT:

A. HE IS NOT COMMITTABLE TO AN INSTITUTION FOR THE MENTALLY RETARDED OR MENTALLY ILL.

B. HE IS NOT AMENABLE TO CARE OR REHABILITATION IN ANY FACILITY UNDER LEGAL RESTRAINT, INCLUDING, IF NECESSARY, FOR THE PERIOD EXTENDING BEYOND HIS MAJORITY.

C. THE SAFETY OF THE COMMUNITY MAY REQUIRE THAT HE BE PLACED UNDER LEGAL RESTRAINT, INCLUDING, IF NECESSARY, FOR THE PERIOD EXTENDING BEYOND HIS MAJORITY.

IT IS THEREFORE ORDERED THAT WILLIE LEE BELL, MAKE HIS APPEARANCE BEFORE THE COURT OF COMMON PLEAS OF HAMILTON COUNTY, OHIO, ADULT DIVISION, FOR SUCH DISPOSITION AS SAID COURT IS AUTHORIZED TO MAKE FOR A LIKE ACT IF COMMITTED BY AN ADULT: WITH BAIL BOND OF FIFTY THOUSAND DOLLARS (\$50,000.00) SURETY.

/s/ [Illegible]
Judge
Court of Common Pleas
Juvenile Division

DATED 'THIS 4TH DAY OF NOVEMBER, 1974

INDICTMENT

11-22-74

No. B743172

HAMILTON COUNTY COMMON PLEAS

THE STATE OF OHIO

vs.

WILLIE LEE BELL AND
SAMUEL HALL

Indictment for

AGGRAVATED MURDER 2903.01 R.C.

AGGRAVATED ROBBERY 2911.01

KIDNAPPING 2905.01 R.C.

A TRUE BILL

/s/ Albert Schaefer, Sr.
Foreman of the Grand Jury

Reported and filed this 22 day of November, A.D. 1974

ROBERT D. JENNINGS
Clerk of Hamilton County Common Pleas

By /s/ Eugene Montesi
Deputy

SIMON L. LEIS, JR.
Prosecuting Attorney
Hamilton County, Ohio

ARRAIGNMENT Nov. 26, 1974

PLEA OF NOT GUILTY ENTERED
(as to Hall)

ARRAIGNMENT DEC. 3, 1974

PLEA OF NOT GUILTY ENTERED
(as to Bell)

THE STATE OF OHIO, HAMILTON COUNTY

The Court of Common Pleas of Hamilton County:

Term of OCTOBER in the year nineteen hundred and SEVENTY-FOUR

HAMILTON COUNTY, SS.

FIRST COUNT

The Grand Jurors of the County of Hamilton, in the name and by authority of the State of Ohio, upon their oaths present that WILLIE LEE BELL AND SAMUEL HALL on or about the SIXTEENTH day of OCTOBER in the year nineteen hundred and SEVENTY-FOUR at the County of Hamilton and State of Ohio, aforesaid, PURPOSELY CAUSED THE DEATH OF JULIUS GRABER, WHILE THE SAID WILLIE LEE BELL AND SAMUEL HALL WERE COMMITTING AGGRAVATED ROBBERY, IN VIOLATION OF SECTION 2903.01 OF THE OHIO REVISED CODE.

SECOND COUNT

AND THE GRAND JURORS AFORESAID UPON THEIR OATHS AFORESAID DO FURTHER PRESENT THAT WILLIE LEE BELL AND SAMUEL HALL ON OR ABOUT THE SIXTEENTH DAY OF OCTOBER IN THE YEAR NINETEEN HUNDRED AND SEVENTY FOUR AT THE COUNTY OF HAMILTON AND STATE OF OHIO, AFORESAID, PURPOSELY CAUSED THE DEATH OF JULIUS GRABER, WHILE THE SAID WILLIE LEE BELL AND SAMUEL HALL WERE COMMITTING KIDNAPPING, IN VIOLATION OF SECTION 2903.01 OF THE OHIO REVISED CODE.

THIRD COUNT

AND THE GRAND JURORS AFORESAID UPON THEIR OATHS AFORESAID DO FURTHER PRESENT THAT WILLIE LEE BELL AND SAMUEL

HALL ON OR ABOUT THE SIXTEENTH DAY OF OCTOBER IN THE YEAR NINETEEN HUNDRED AND SEVENTY-FOUR AT THE COUNTY OF HAMILTON AND STATE OF OHIO, AFORESAID, IN COMMITTING A THEFT OFFENSE, INFLICTED SERIOUS PHYSICAL HARM ON JULIUS GRABER, IN VIOLATION OF SECTION 2911.01 OF THE OHIO REVISED CODE.

FOURTH COUNT

AND THE GRAND JURORS AFORESAID UPON THEIR OATHS AFORESAID DO FURTHER PRESENT THAT WILLIE LEE BELL AND SAMUEL HALL ON OR ABOUT THE SIXTEENTH DAY OF OCTOBER IN THE YEAR NINETEEN HUNDRED AND SEVENTY-FOUR AT THE COUNTY OF HAMILTON AND STATE OF OHIO, AFORESAID, BY FORCE AND/OR THREAT REMOVED JULIUS GRABER FROM THE PLACE WHERE HE WAS FOUND FOR THE PURPOSE OF FACILITATING THE COMMISSION OF A FELONY, AND FAILED TO RELEASE THE SAID JULIUS GRABER IN A SAFE PLACE UNHARMED, IN VIOLATION OF SECTION 2905.01 OF THE OHIO REVISED CODE.

SPECIFICATION TO THE FIRST COUNT

THE GRAND JURORS FURTHER FIND AND SPECIFY THAT THE OFFENSE IN THE FIRST COUNT OF THE INDICTMENT WAS COMMITTED WHILE THE SAID WILLIE LEE BELL AND SAMUEL HALL WERE COMMITTING AGGRAVATED ROBBERY, IN VIOLATION OF SECTION 2911.01 OF THE OHIO REVISED CODE.

SPECIFICATION TO THE SECOND COUNT

THE GRAND JURORS FURTHER FIND AND SPECIFY THAT THE OFFENSE IN THE THIRD COUNT OF THE INDICTMENT WAS COMMITTED WHILE

THE SAID WILLIE LEE BELL AND SAMUEL HALL WERE COMMITTING KIDNAPPING, IN VIOLATION OF SECTION 2905.01 OF THE OHIO REVISED CODE.

/s/ Simon L. Leis, Jr.
Prosecuting Attorney
Hamilton County, Ohio

/s/ [Illegible]
Assistant Prosecuting Attorney

INSANITY PLEA

12-12-74

COURT OF COMMON PLEAS
CRIMINAL DIVISION
HAMILTON COUNTY, OHIO

Case No. B-743172

STATE OF OHIO, PLAINTIFF

vs.

WILLIE LEE BELL, DEFENDANT

PLEA OF NOT GUILTY
BY REASON OF INSANITY

The Defendant, by and through counsel, Fred H. Hoefle and Albert Mechley, Jr., on appearing in open court and after being duly advised of his constitutional rights and the consequences of all pleas which may be entered to the indictment on his behalf, herewith pleads not guilty and not guilty by reason of insanity to the charges of aggravated murder, aggravated robbery and kidnapping as set out in the indictment, No. B-743172.

/s/ Willie Lee Bell
WILLIE LEE BELL
Defendant

/s/ Fred H. Hoefle
FRED H. HOEFLE
Co-counsel for Defendant

/s/ Albert Mechley, Jr.
ALBERT MECHLEY, JR.
Co-counsel for Defendant

CERTIFICATE OF ATTORNEYS

The undersigned, attorneys for the Defendant, Willie Lee Bell, hereby certify:

1. We have read and fully explained to the Defendant all the accusations contained in the courts in the indictment against him and all of the pleas which he may enter with respect to them, including the consequences of each plea.

2. We have advised him with respect to his rights to trial, including but not limited to the right to a jury trial, the right to be confronted with and to cross-examine witnesses against him, the right to testify in his own behalf, and the privilege against self-incrimination.

3. To the best of our knowledge and belief, each statement set forth in the preceding plea by the Defendant and this certificate are in all respects accurate and true.

4. The plea of not guilty and not guilty by reason of insanity offered here by the Defendant accords with our understanding of the pleas the Defendant wants to offer to the indictment.

Signed by us in open court in the presence of the Defendant on the 12th day of December, 1974.

/s/ Fred H. Hoefle
FRED H. HOEFLE
Co-counsel for Defendant

/s/ Albert Mechley, Jr.
ALBERT MECHLEY, JR.
Co-counsel for Defendant

ENTRY AMENDING INDICTMENT

1-10-75

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO
CRIMINAL DIVISION

No. B-743172

STATE OF OHIO, PLAINTIFF

v.

WILLIE LEE BELL, DEFENDANT

ENTRY AMENDING INDICTMENT

This cause came on to be heard on the Motion of counsel for the State of Ohio to Amend the Indictment, and the Court, being fully advised in the premises, finds the Motion to be well taken.

IT IS THEREFORE ORDERED that the Specification to the Second Count of the Indictment is amended to read:

"The Grand Jurors further find and specify that the offense in the second count of the indictment was committed while the said Willie Lee Bell and Samuel Hall were committing Kidnapping, in violation of Section 2905.01 of the Ohio Revised Code."

BILL OF PARTICULARS

1-10-75

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO
CRIMINAL DIVISION

No. B-743172

STATE OF OHIO, PLAINTIFF

v.

WILLIE LEE BELL, DEFENDANT

BILL OF PARTICULARS

Now comes the State of Ohio through William P. Whalen, Jr., Assistant Prosecuting Attorney of Hamilton County, Ohio, and states the following:

On October 16, 1974, Willie Lee Bell individually, and in conjunction with Samuel Hall, did remove one Julius Graber from his residence at gun point. That Mr. Graber was forcibly taken to 1047 Groesbeck Avenue and there some of his possessions were removed from him and he was then shot and killed.

The State further contends that all events occurred in Hamilton County, State of Ohio.

/s/ Wm. P. Whalen, Jr.
Ass't. Prosecuting Attorney

JURY WAIVER

1-10-75

COURT OF COMMON PLEAS
CRIMINAL DIVISION
HAMILTON COUNTY, OHIO

No. B-743172

STATE OF OHIO, PLAINTIFF

—vs—

WILLIE LEE BELL, DEFENDANT

JURY WAIVER AND APPLICATION FOR TRIAL
BY THREE-JUDGE PANEL

Defendant, by and through his Court appointed counsel, respectfully advises this Court that he is effectively waiving his right to a trial by jury of his peers, by demanding that this Court try him by means of a three-judge panel.

Defendant understands that he has a constitutional right to a trial by a jury of 12 persons and that his demand for trial by a three-judge panel effectively waives his constitutional right to that jury trial.

/s/ Willie Bell
WILLIE LEE BELL

/s/ Albert Mechley, Jr.
ALBERT MECHLEY, JR.

/s/ Fred H. Hoefle
FRED H. HOEFLE

AFFIDAVIT OF COUNSEL

Fred H. Hoefle and Albert Mechley, Jr., being first duly cautioned and sworn, depose and say:

They are the Court appointed counsel for Willie Lee Bell, defendant in this matter, and have fully and completely advised him to the best of their ability of the various alternatives open to him in the defense of this matter, including his constitutional right to a trial by his peers or, in the alternative, the right to demand a trial by a three-judge panel.

After discussing the above alternatives at great length, providing the defendant with our recommendations, and giving the defendant approximately one week to think about his alternatives, defendant Willie Lee Bell has requested that we on his behalf proceed to demand a trial by a three-judge panel and thereby waive his right to a trial by jury.

/s/ Fred H. Hoefle
FRED H. HOEFLE

/s/ Albert Mechley, Jr.
ALBERT MECHLEY, JR.

Sworn to and signed in open court this 10th day of January, 1975.

ENTRY WAIVING TRIAL BY JURY

1-10-75

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO
CRIMINAL DIVISION

No. B-743172

STATE OF OHIO, PLAINTIFF

v.

WILLIE LEE BELL, DEFENDANT

ENTRY WAIVING TRIAL BY JURY

This matter came on for hearing upon the Motion of the defendant.

In open court the defendant, by written Motion, requests to exercise his right to waive a trial by jury and to be tried by a three judge panel.

The Court, after hearing from the defense attorneys and examining their affidavit, made an examination of the defendant.

It is the finding of the Court that the defendant understands the nature of his request and his constitutional right to a trial by jury, and therefore his Motion is hereby granted, and a three judge panel will be appointed.

ENTRY FINDING DEFENDANT SANE FOR PURPOSE
OF STANDING TRIAL

1-10-75

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO
CRIMINAL DIVISION

No. B-743172

STATE OF OHIO, PLAINTIFF

v.

WILLIE LEE BELL, DEFENDANT

ENTRY FINDING DEFENDANT SANE FOR THE
PURPOSE OF STANDING TRIAL

This cause came on for hearing upon the Order of this Court granting the defendant's Motion for a pre-trial psychiatric examination.

It is found that, in compliance with the Order, the defendant was examined by qualified, impartial psychiatrists, to-wit: Dr. Robert J. McDevitt, Dr. Elbert H. Seymour and Dr. Roy Whitman, and that the said psychiatrists have submitted a written report to this Court.

Upon consideration of the testimony of witnesses, the report which was put into evidence, and the arguments of counsel, the Court finds that the defendant is competent to stand trial, that the defendant can meaningfully assist his attorneys in his trial, and he understands the nature of the charges against him.

SENTENCE ENTRY 2-3-75

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO
CRIMINAL DIVISION

No. B743172

THE STATE OF OHIO

—vs—

WILLIE LEE BELL

INDICTMENT FOR:

AGGRAVATED MURDER 2903.01 R.C.
AGGRAVATED ROBBERY 2911.01 R.C.
AND KIDNAPPING 2903.01 R.C.

[Entered Jan. 17, 1975]

COURT FINDING

This Cause came on to be heard, the Defendant, Willie Lee Bell having waived a trial by Jury, in writing, and was submitted to the panel of three (3) Judges, Hon. John W. Keefe, Hon. Thomas C. Nurre and Hon. William R. Matthews.

And the Court, having heard the evidence and arguments of Counsel, the Court's unanimous finding with respect to the plea of insanity is that the Defendant, Willie Lee Bell, is sane.

The Law of Ohio prohibits conviction on both of the two (2) counts of Aggravated Murder.

This Court finds unanimously, the Defendant, Willie Lee Bell, guilty of Aggravated Murder as charged in the Second Count of the Indictment; Guilty of Aggravated Robbery as charged in the Third Count of the Indictment,

and Guilty of Kidnapping as charged in the Fourth Count of the Indictment. This Court also finds, unanimously, the Defendant Guilty of the Specification to the Second Count in which it is specified that the Aggravated Murder was committed while the Defendant was committing Kidnapping in violation of Sec. 2905.01 of the Revised Code of Ohio.

A pre-sentence investigation is Ordered immediately and a psychiatric examination will be made of the Defendant.

A hearing in connection with sentencing will be held on Monday, February 3, 1975 at 9:30 A.M.

/s/ John W. Keefe
JUDGE JOHN W. KEEFE

/s/ Thomas C. Nurre
JUDGE THOMAS C. NURRE

/s/ William R. Matthews
JUDGE WILLIAM R. MATTHEWS

MOTION ATTACKING DEATH PENALTY

2-3-75

COURT OF COMMON PLEAS
CRIMINAL DIVISION
HAMILTON COUNTY, OHIO

No. B-743172

STATE OF OHIO, PLAINTIFF

—vs—

WILLIE LEE BELL, DEFENDANT

MOTION FOR AN ORDER DECLARING DEATH
PENALTY UNCONSTITUTIONAL DISMISSING
THE SPECIFICATIONS OF AGGRAVATING CIR-
CUMSTANCES FROM THE INDICTMENT, AND
SENTENCING DEFENDANT TO LIFE IMPRISON-
MENT FOR HIS CONVICTION OF AGGRAVATED
MURDER

Defendant, through counsel, respectfully moves this Court for an order declaring the provisions of the Ohio Revised Code providing for the death penalty under certain circumstances upon conviction of aggravated murder unconstitutional, dismissing the specifications of aggravating circumstances from the indictment and sentencing defendant to life imprisonment on the conviction of aggravated murder herein, for the reason that the death penalty is unconstitutional under the Eighth and Four-

teenth Amendments to the United States Constitution as cruel and unusual punishment, both by the nature of the penalty itself, and the arbitrary and capricious manner of its enforcement under the Revised Code.

ALBERT MECHLEY, JR. AND
H. FRED HOEFLE

/s/ H. Fred Hoefle
H. FRED HOEFLE
Attorneys for Defendant
400 Second National Building
Cincinnati, Ohio 45202
241-1268

[MEMORANDUM OMITTED IN PRINTING]

SENTENCE ENTRY

2-3-75

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO
CRIMINAL DIVISION

No. B-743172

STATE OF OHIO, PLAINTIFF

v.

WILLIE LEE BELL, DEFENDANT

INDICTMENT FOR: AGGRAVATED MURDER
2903.01 R.C.; KIDNAPPING, 2905.01
R.C.; AGGRAVATED ROBBERY, 2911.01

The defendant, Willie Lee Bell, was present in open court with his counsel, H. Fred Hoefle and Albert Mechley, Jr., on the third day of February, 1975, having been previously found guilty of the offenses of Aggravated Murder, 2903.01 R.C., Kidnapping 2905.01 R.C., Aggravated Robbery, 2911.01 R.C., and the specifications to the second count of the indictment.

Pursuant to Sections 2929.03 and 2929.04 of the Ohio Revised Code, a hearing on mitigating circumstances prior to sentencing for a capital offense was held.

The Court afforded defendant's counsel an opportunity to speak on behalf of the defendant, and to present any testimony and other evidence relevant to the penalty which should be imposed.

Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the Court, pursuant to division (D) of Section 2929.03 of the Ohio Revised Code, this panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of Section

2929.04 have been established by a preponderance of the evidence.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED by this Court that the defendant, Willie Lee Bell, on the charge of Kidnapping be sentenced to the Ohio Penitentiary for a period of time not less than seven and not more than twenty-five years; on the Aggravated Robbery that he be sentenced to the Ohio Penitentiary for a period of time not less than seven years and not more than twenty-five years, to run consecutively; on the charge of Aggravated Murder, 2903.01 in specifications to the second count of the Indictment, be taken to the Jail of Hamilton County, at Cincinnati, Ohio, and within the next thirty (30) days be delivered by the Sheriff of Hamilton County, Ohio, to the Warden of the Ohio State Penitentiary, and that on the eighteenth day of July, 1975, the said Warden shall cause a current of electricity of sufficient intensity to cause death, to pass through the body of Willie Lee Bell, the application of such current to be continued until the said Willie Lee Bell is DEAD.

The defendant was notified of his right to appeal as required by Crim. R. 32(A)(2).

/s/ John W. Keefe
JOHN W. KEEFE
Judge

/s/ William R. Matthews
WILLIAM R. MATTHEWS
Judge

/s/ Thomas C. Nurre
THOMAS C. NURRE
Judge

ENTERED Feb. 3 1975

Image 45

2. *Court of Appeals Entries:*

JUDGMENT ENTRY

4-12-76

COURT OF APPEALS
FIRST APPELLATE DISTRICT
Hamilton County, Ohio

No. C 75068

STATE OF OHIO, APPELLEE

—vs.—

WILLIE LEE BELL, APPELLANT

JUDGMENT ENTRY

April 12, 1976

This cause came on to be heard upon the appeal on questions of law, assignments of error, the record from the Court of Common Pleas of Hamilton County, Ohio, the briefs and the arguments of counsel.

Upon consideration thereof, the Court finds that the assignments of error are not well taken for the reasons set forth in the Opinion filed herein and made a part hereof.

It is, therefore, Ordered by the Court that the judgment of the Court of Common Pleas of Hamilton County, Ohio, be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Court of Common Pleas of Hamilton County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with Rule 24, Appellate Rules.

And the Court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further ordered that a certified copy of this Judgment with a copy of the Opinion attached, shall constitute the mandate pursuant to Rule 27, Ohio Rules of Appellate Procedure.

To all of which the appellant, by his counsel, excepts.

To the Clerk:

Enter upon the docket of the court.

/s/ Shannon
Presiding Judge

ENTRY REINSTATING SENTENCE

4-23-76

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

No. C-75068

STATE OF OHIO, APPELLEE

vs.

WILLIE LEE BELL, APPELLANT

ENTRY REINSTATING SENTENCE

This cause came on to be heard by the Court upon the appeal of the appellant, Willie Lee Bell, and the appellant having been heretofore sentenced which sentence was stayed pending the disposition of the within appeal, and

This Court having affirmed the judgment of the Common Pleas Court, Hamilton County, Ohio, on the 12th day of April, 1976;

This Court does hereby reinstate the sentence of the trial court, that the Warden of the Southern Ohio Correctional Facility, shall cause a current of electricity of sufficient intensity to cause death, to pass through the body of Willie Lee Bell, the application of such current to be continued until the said Willie Lee Bell is DEAD, said execution of sentence shall take place on the 27th day of August, 1976.

ORDER STAYING EXECUTION OF DEATH SENTENCE

4-27-76

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO

No. C 75068

THE STATE OF OHIO, PLAINTIFF-APPELLEE

—vs.—

WILLIE LEE BELL, DEFENDANT-APPELLANT

ORDER STAYING EXECUTION OF
DEATH SENTENCE

This cause came on for hearing on the motion of the defendant-appellant, Willie Lee Bell, for a stay of the execution of the sentence of death, heretofore rendered by the Court of Common Pleas, and affirmed by this Court, pending his appeal of the affirmance of his conviction and sentence to the Supreme Court of Ohio.

The Court finds that the motion is well taken and ought to be granted.

THEREFORE, IT IS ORDERED that the sentence of death herein imposed on defendant-appellant, Willie Lee Bell, IS HEREBY STAYED pending the disposition of his appeal in the Supreme Court of Ohio.

HAVE SEEN

/s/ Raymond E. Shannon
RAYMOND E. SHANNON
Presiding Judge

/s/ George H. Palmer
Judge

/s/ Robert R. Hastings, Jr.
Assistant Prosecuting Attorney
Attorney for the State

/s/ H. Fred Hoefle
For H. FRED HOEFLE and
THOMAS A. LUKEN
Attorneys for Defendant-appellant

3. Ohio Supreme Court Entries:

JUDGMENT ENTRY OF AFFIRMANCE

12-22-76

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,

1976 TERM

City of Columbus.

To wit: December 22, 1976

No. 76-499

THE STATE OF OHIO, APPELLEE

vs.

WILLIE LEE BELL, APPELLANT

APPEAL FROM THE COURT OF APPEALS FOR HAMILTON COUNTY

This cause, here on appeal from the Court of Appeals for Hamilton County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed for the reasons set forth in the opinion rendered herein and it appearing to the Court that the date heretofore fixed for the execution of the judgment and sentence of the Court of Common Pleas is now past, this Court proceeding as required by law does hereby fix the 22nd day of February, 1977, as the date for carrying said sentence into execution by the Superintendent of the Southern Ohio Correctional Facility, or in his absence by the Assistant Superintendent, in accordance with the statutes in such case made and provided.

It is further ordered that a certified copy of this entry and a warrant under the seal of this Court be duly certified to the Superintendent of the Southern Ohio Correc-

tional Facility and the Superintendent make due return thereof to the Clerk of the Court of Common Pleas of Hamilton County, and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Hamilton County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this — day of — 19—

_____ Clerk

_____ Deputy

MANDATE—12-22-76

THE SUPREME COURT
OF THE STATE OF OHIO

THE STATE OF OHIO,

1976 TERM

City of Columbus.

To wit: December 22, 1976

No. 76-499

THE STATE OF OHIO, APPELLEE

vs.

WILLIE LEE BELL, APPELLANT

MANDATE

To the Honorable Common Pleas Court

Within and for the County of Hamilton, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals affirmed for the reasons set forth in the opinion rendered herein.

It is further ordered that the execution date be set for Tuesday, February 22, 1977.

THOMAS STARTZMAN
Clerk

_____19—

[RECORD OF COSTS OMITTED IN PRINTING]

No. 76-499

 IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO, PLAINTIFF-APPELLEE

—vs.—

WILLIE LEE BELL, DEFENDANT-APPELLANT

 Appeal from the Court of Appeals, First Appellate
 District, Hamilton County, Ohio

 MOTION OF DEFENDANT-APPELLANT
 FOR REHEARING AND FOR A STAY
 OF EXECUTION

H. FRED HOEFLE and
THOMAS A. LUKE400 Second National Building
830 Main Street
Cincinnati, Ohio 45202
1-513-241-1268

Counsel for Defendant-appellant

MOTIONS

Defendant-appellant, through his undersigned counsel, respectfully moves the Court for the following orders:

1. For a rehearing and additional oral argument, in accordance with and pursuant to Rule IX, § 1 of the Rules of this Court; and

2. For an order staying execution of the death sentence imposed herein by this Court on December 22, 1976, setting the date for execution of the sentence of death of February 22, 1977, pursuant to Rule IX, § 2; and 2949.24 R.C.

3. For an order staying the execution of the sentence of death until an appeal from the decision of this Court is filed and decided by the Supreme Court of the United States.

MEMORANDUM IN SUPPORT OF MOTIONS

In *State v. Bayless*, 48 Ohio St.2d 73 (11-24-76), this Court upheld the Ohio statutory scheme for implementation of the death penalty, deciding that the standards previously established by the Supreme Court of the United States in *Gregg v. Georgia*, — US —, 96 S.Ct. 2909 (1976) for constitutional implementation of the ultimate sanction were satisfied by the Ohio General Assembly in enacting §§ 2929.02-.04 R.C.

In *Gregg v. Georgia*, supra., the Supreme Court of the United States particularly described the features of the Georgia statute which were felt to eliminate the arbitrary and freakish imposition of the death penalty condemned in *Furman v. Georgia*, 408 US 238, 92 S.Ct. 2726:

In short, Georgia's new sentencing procedures require as a prerequisite to the imposition of the death penalty, specific jury findings as to the circumstances of the crime or *the character of the defendant*. Moreover to guard further against a situation comparable to that presented in *Furman*, the Supreme Court of Georgia compares each death sentence with

the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate. On their face these procedures seem to satisfy the concerns of *Furman*. 96 S.Ct. 2937 [Emphasis added].

....

Under the procedures before the Court in that case [the *Furman* case, in which the procedures were found unconstitutional] sentencing authorities were not directed to give attention to the nature or circumstances of the crime committed or to the *character or record of the defendant*. Left unguided, juries imposed the death sentence in a way that could only be called freakish. The new Georgia sentencing procedures, by contrast, focus the jury's attention on the particularized nature of the crime *and the particularized characteristics of the individual defendant*. . . . No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines. 96 S.C. 2941 [Emphasis added].

The Supreme Court of the United States thus indicated its belief that the death penalty may not be imposed constitutionally by a state unless that state's statutory scheme provides for [1] some consideration of the accused's prior record and character as a *meaningful* criteria, and [2] a case by case comparison by the State Supreme Court of all death sentences as an additional safeguard against the disproportionate imposition of the death sentence in a particular case.

We respectfully submit that *neither* of the criteria set forth in *Gregg* are satisfied by the Ohio procedures. While it is true, as this Court pointed out in its opinion herein, that the statute requires the sentencing court to consider "the history, character and condition of the offender," such consideration of the character and record of the accused does not have any determinative effect on whether the death penalty is imposed. § 2929.04 (B)

The character and record of the defendant, which the Supreme Court of the United States has held *must* be

a determinative factor, has nothing whatsoever to do with establishing any of the three mitigating circumstances which must be established in order to avoid the ultimate punishment: character and record of the defendant cannot assist the court in determining whether the victim induced or facilitated the offense; nor can the character and record of the accused contribute much, if anything, to a determination of whether the accused was under duress, coercion, or strong provocation; finally, the character and record of the offender is not rationally connected to a determination of whether or not the offender's psychosis or mental deficiency was the primary cause of the offense.

Since the only method by which the offender may be spared is a determination of the sentencing court of one of the aforesaid "mitigating" factors, and since his character and record do not have any relationship to the determination of any of the statutory mitigating circumstances, the character and record of the defendant are not considered under Ohio law as affecting the decision of whether to impose the death sentence. The Ohio scheme does not, therefore, comport with the constitutional standards for the imposition of that penalty prescribed in *Gregg v. Georgia*, *supra*.

Further, the Ohio statutes and laws do not provide for review of each death sentence by the Ohio Supreme Court in comparison with the death sentences imposed in other cases, to avoid the freakish imposition of that sentence. To be sure, the Ohio Constitution provides an appeal as a matter of right in capital cases, but nothing in the Constitution or the Revised Code mandates the review of the sentence in each case in comparison with the appropriateness of the death sentence in other cases. In fact, in this case itself, there is no such comparison with the other cases under the new law in which the death sentence was upheld by this Court, e.g. *State v. Bayless*, 48 Ohio St.2d 73, *State v. Reaves and Woods*, 48 Ohio St.2d 127, *State v. Strodes*, 48 Ohio St.2d 113, and *State v. Roberts*, 48 Ohio St.2d —, as well as in *State v. Hall*, 48 Ohio St.2d —.

Ohio's statutory scheme thus fails to pass constitutional muster, and we urge the Court to grant the motion for rehearing, or, in the alternative, for a stay of the imposition and execution of the death sentence herein until appellant's appeal to the Supreme Court of the United States has been finally determined.

Respectfully submitted,

H. FRED HOEFLE, for
H. FRED HOEFLE AND
THOMAS A. LUKE
Attorneys for
Defendant-appellant
400 Second National Building
830 Main Street
Cincinnati, Ohio 45202
1-513-241-1268

(Certificate of Service omitted in printing)

ENTRY DENYING REHEARING

(1-14-77)

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,

1977 TERM

City of Columbus.

To wit: January 14, 1977

No. 76-499

STATE OF OHIO, APPELLEE,

vs.

WILLIE LEE BELL, APPELLANT.

REHEARING

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the record of said Court, to wit, from Journal No. — Page —.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 14th day of January, 1977.

THOMAS L. STARTZMAN, Clerk.

By _____ Deputy.

ENTRY STAYING EXECUTION

(1-14-77)

THE STATE OF OHIO, 1977 TERM
 City of Columbus. To wit: January 14, 1977

THE STATE OF OHIO, APPELLEE,

vs.

WILLIE LEE BELL, APPELLANT.

ENTRY
 (HAMILTON COUNTY)

Upon consideration of the motion, filed by counsel for appellant, to stay execution of sentence pending the timely filing of an appeal to the Supreme Court of the United States, it is therefore

ORDERED that execution of sentence be, and the same hereby is, stayed, pending the timely filing of an appeal to the Supreme Court of the United States.

It is further ORDERED that if a timely notice of appeal is filed to the Supreme Court of the United States, this stay will automatically continue pending final determination of the appeal by that Court.

It is further ORDERED that the Clerk of this Court shall forthwith send a certified copy of this Stay of Execution to the Superintendent of the Southern Ohio Correctional Facility, who shall acknowledge receipt thereof.

/s/ C. William O'Niel
 Chief Justice

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. — Page —.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 14th day of January, 1977.

THOMAS L. STARTZMAN, Clerk.

By [Illegible], Deputy.

B. REPORTS SUBMITTED TO THE TRIAL COURT

PRE-TRIAL PSYCHIATRIC REPORT

Filed 1-8-75

December 30, 1974

Judge John W. Keefe
Court of Common Pleas
Hamilton County Courthouse
Cincinnati, Ohio 45202

Re: Willie Lee Bell
B 743172

Dear Judge Keefe:

This sixteen year old black single male was examined in the Hamilton County Jail on December 26, 1974, by the undersigned. In addition after the examination, the undersigned had a conference in which they discussed their respective findings in regard to Mr. Bell. All information was taken from the defendant but the examination specifically addressed itself to:

1. his competency to stand trial
2. his ability to assist his attorney meaningfully in such a trial
3. whether he knew the nature of the charges against him

We also discussed at some length his mental state at the time of the commission of the offense. The following report is given.

When Mr. Bell was seen initially in the Hamilton County Jail, he was somewhat resistant at first to interviews. He cooperated well after we told him we were psychiatrists ordered by the Court to examine him.

He states that at first he was not present at all during the murder of Mr. Graber, but then admitted that he was in the car but denies any active involvement with Samuel Hall in the offense. He gives a fairly

detailed history of the meeting with Sam Hall that morning at the Community Center, going and picking up a car with him and the various movements in and out of Cincinnati involved in the next 24 hours.

He denies at any time implicitly threatening or attempting to harm the decedent. At first he denied any knowledge, but then gave a very detailed account.

He did admit having taken a table of "Mescaline Blue" which he claims was a downer and also smoking marijuana, however, his perceptions were not distorted and there was no evidence from his history that he was having hallucinations or any other drug effect.

Past history. He was born and raised in the Cincinnati area. His mother is thirty-nine years old, has a back injury and is on welfare. He has two brothers ages twelve and four that live in the home, two sisters ages eighteen and twenty-two. He has had little contact with his father. He claims that he has had some problems with school, was seen in the seventh grade by a psychiatrist from the Cincinnati Board of Education on a number of occasions. He claims the principal thought he was "crazy" but that he had good contacts with the psychiatrists. He has been at the McMillian Center for the past two years, but reluctantly admitted that he had not been at school for a month and half and he had been attempting to find a job.

When asked by the examiners what the worse thing was that ever happened to him in his life, he claimed it was an auto accident when he was seven or eight years old, but he was dazed and unconscious for a few days. The best thing he claims that ever happens to him is "when he gets high".

Mental status conducted by the examiners indicated that he was in contact with reality, his thought processes were clear, logical coherent. He did know the nature of the charge against him, but did not seem to understand the seriousness of the offense that he was being charged with. He shrugged his shoulders and said, "it's just a matter of life and death." There was, however, no delusions, hallucinations, or ideas of reference solicited. His intelligence appeared to be below average in

the vicinity of 90, and his thinking judgment tends to be in keeping with his intellectual ability. Fundamental information was quite good.

At the time of the offense he claims he was under the influence of a "blue mesc", and "weed", and these influenced some of his behavior. He claims that he was frightened that Mr. Hall would shoot him but he admits that he did nothing to intervene in the activities.

The examiners after carefully examining him and evaluating the history as given by him, find that:

1. He is in adequate contact with reality.
2. He knows the nature of the charge against him.
3. He is able to assist his attorney meaningfully in his defense.

In addition, the examiners note at the time of the commission of the offense he was under the influence of some drug, however, he gives a history of being able to drive a car from Cincinnati to Dayton, Ohio. He is also able to go through rather complex maneuvers and gives both the examiners considerable detail about his activities during the day. Certainly there is no evidence that he had a perceptual distortion from any of his history, although in the past he has taken hallucinogens and knows what they do. The only history suggested is a consultation with psychiatrists three years ago, presumably because of behavioral difficulties in school, but only outpatient therapy was attempted.

There is no other evidence present that this defendant is not competent to stand trial and there is no evidence presented by the defendant that this examination would indicate he was suffering from any mental disease at the time of the commission of the act. It is recommended that his particular case be judged on its legal merits and we will be glad to review the records from the Board of Education if this will be of any assistance to the Court or to the defendant.

Respectfully Submitted,

/s/ Robert J. McDevitt
ROBERT J. McDEVITT, M.D.

/s/ Elbert H. Seymour
ELBERT H. SEYMOUR, M.D.

/s/ Roy M. Whitman
ROY M. WHITMAN, M.D.

POST-CONVICTION PSYCHIATRIC REPORT

Filed 1-30-75

January 23, 1975

Honorable John W. Keefe
Court of Common Pleas
Hamilton County Courthouse

Honorable William R. Matthews
Court of Common Pleas
Hamilton County Courthouse

Honorable Thomas C. Nurre
Court of Common Pleas
Hamilton County Courthouse

Re: Willie Lee Bell
B-743172

ENTRY APPOINTING PSYCHIATRISTS TO MAKE
PSYCHIATRIC EXAMINATION FOLLOWING
DEFENDANT'S CONVICTION OF
AGGRAVATED MURDER

The undersigned have carefully examined Willie Lee Bell in the Hamilton County Jail on January 22, 1975 and January 23, 1975. Two of the examiners, Dr. Roy Whitman and Dr. Robert McDevitt examined him on January 22, 1975, and Dr. Elbert Seymour examined him on January 23, 1975. It should be noted by the Court that the examiners have also submitted a report on Willie Lee Bell on December 30, 1974, outlining some of the past history. The examination today specifically addressed the issues as outlined by the Revised Code of Ohio on these particular accounts.

As to the first question, there was no evidence presented by the defendant that Mr. Graber in any way precipitated or aggravated his murder. Mr. Bell stated that at no time did Mr. Graber offer any resistance, cause any provocation or say anything to either he or Sam Hall.

As far as the second charge, "it is likely that the defense would have been committed but the fact that the offender was under duress, coercion, or strong provocation". Willie Lee Bell states that he was not afraid of Sam Hall but he denied knowing what Sam Hall was up to. He claimed that he knew that Mr. Graber was placed in the trunk, he drove the car under Sam Hall's direction, backed into the spot at the cemetery. He claimed that he was not aware of what Sam Hall was doing at the time of the offense. He stated specifically that after he heard the shot, "I was just thinking that he was doing it to scare him". I didn't know he shot the man." He stated that Sam Hall ran back down the hill and that he picked up another shell and went back after Mr. Graber. He claimed that at that time he felt that Mr. Graber had left. He said further that he did not attempt to leave or did not attempt to interfere with the shooting. In fact, he appeared to be relatively nonresponsive when we challenged him about the fact that he was able to ascertain at this time that the intention was to do harm to Mr. Graver, that he felt that there was any strength on his part to do anything about it.

In regard to the third charge of the Revised Code, "The offense was primarily the product of the offender psychosis or mental deficiency—insanity." On previous examinations, we have not found that the defendant was insane or not capable of understanding the charges against him. Examination today points out some facets not brought out by the previous examination. We were not able to ascertain any particular motivation on the part of the defendant in terms of committing this act. Previous concern had been the fact that he was sixteen years of age and was not capable of understanding the gravity of the situation. Examination today revealed that the individual is quite responsive, alert, to the questions of the examiners and claimed that he understood the possibility of being sentenced to the electric chair. He admitted to the examiners that he did not care to think about this possibility and that he "felt the same every day." That he adapted an attitude of stoicism and resignation as far as any sentence was concerned. He stated

further that he did not feel at any time that he had difficulties mentally. He was questioned very closely about his behavior at the time of the psychiatric consultation some years ago and he again confirmed that he felt it was the judgement of the principal that he was having mental problems, but did not feel in any way that he himself was having any problem. He admitted that he had taken up with Sam Hall because he admired his style and the fact that he had always hung around with older individuals. He was at a loss to explain to the examiners why he was particularly awed by older teenagers.

Direct mental status examination revealed again that his thinking was clear, coherent, and well organized. In addition today we found that he has a fairly good knowledge of chess and is considered the second best player in the jail. On standard psychological mental status testing, he scored an IQ score of about 110-120. Therefore the examiners are lead to believe that he has a better than average mental capacity for a youngster of age sixteen. Despite this above average IQ, his answers to the behavior in question seems to be slightly inappropriate.

When questioned about what his defense would be at present, he claimed that he felt very angry because no one would believe his story and preferred to believe the story of Sam Hill. He felt that by merely stating his story that he would be exonerated. He was unable to grasp the significance that by going along with Sam Hall and staying with him during the period of time that the offense occurred he had in fact agreed to and passively participated in the offense with Sam Hall. As before, he answers standard information on judgement with a fair degree of exactitude. The examiners are lead to believe after carefully examining him that he does not show a significant mental defect or mental deficiency to exonerate him from the responsibility for this particular act, except for his persistent inability to understand this facet of his case.

In summary, as best the examiners can ascertain at this stage, he claimed that he passively accompanied Sam Hall, stated that he did not perpetrate the shooting

but was in the car at the time that Mr. Graber was shot. He feels that he was not responsible because he was not physically present and did not fire the weapon. He cannot understand why he should be implicated merely because he was with him and does not understand this particular aspect of the law. Nonetheless, he seems to have better than average intelligence, adequate judgement and knows significant mental pathology which would have caused him to have participated in this activity without full and conscious consent. The examiners thus are lead to conclude that none of the above stated circumstances in the law are present as far as this offense is concerned.

Respectfully Submitted,

/s/ Robert J. McDevitt
ROBERT J. MCDEVITT, M.D.

/s/ Roy M. Whitman
ROY M. WHITMAN, M.D.

/s/ Elbert H. Seymour
ELBERT H. SEYMOUR, M.D.

Addendum to psychiatric evaluation report of January 23, 1975, reference to paragraphs two and three, page three.

The purpose of this addendum is to offer an explanation of the defendant's seeming lack of feeling and inability to see himself as an active participant in the offense of which he has been convicted. He sees himself as a passive participant in the crime that day and fully believed that his sense of responsibility and guilt was of a much reduced order of magnitude than Sam Hall's. This is reflected in his statement: "Sam told me to drive the car, so I drove the car," an act and a stance which he feels does not make him guilty of murder according to his own (and the law's) standards. His statement was given within this frame of reference i.e., that he was not really an active participant in the murder and therefore not guilty and others (including the judges) would see him according to his own standards of guilt. This also explains his strong disappointment that he was found guilty, seeing this decision as one where Sam Hall was believed rather than he. If he had been believed, he felt he would have been found innocent or guilty of a lesser charge. This way of avoiding active responsibility and personal guilt is akin to the mental mechanism of unconscious denial, by which he really sees himself as not responsible for the acts of that day and consequently has shown little feeling of responsibility for the act and felt a great deal of anxiety about the possible punishment. On the day I examined him (January 23, 1975) this mechanism of denial was beginning to become less effective. Although an immature way of handling the feelings around responsibility, and guilt, this explanation of the defendant's behavior does not constitute grounds for a diagnosis of psychosis mental deficiency or insanity. It is enclosed to hopefully aid the bench in its decision by attempting to explain the behavior of the defendant.

Respectfully Submitted,

/s/ Elbert Seymour
ELBERT SEYMOUR, M.D.

PRESENTENCE REPORT BY PROBATION DEPARTMENT
Filed 1-30-75

PRELIMINARY INVESTIGATION -CASE NO. 23889

WILLIE LEE BELL JR. —Age 17 Negro

Offense —Aggravated Murder, Kidnapping
—Robbery

Indictment Number —B-743172

Arrests —Seven

Date of Arrest —10-23-74

Marital Status —Single

Industrial History —Negligible

JUDGES: JOHN W. KEEFE, THOMAS C. NURRE, WM.
R. MATTHEWS

Prosc Attorney —Claude Crowe
William Whalen

Defense Attorney —Albert Mechley
Fred Hoefle

THERE ARE NO OTHER INDICTMENTS PENDING

(Co-defendant Samuel Hall)

ADULT PROBATION DEPT.
HAMILTON COUNTY

PRESENTENCE REPORT

PROBATION Form 2

CASE NO. 23889

JUDGES: JOHN W. KEEF
THOMAS C. NURRE, WM.
R. MATTHEWS

NAME

BELL: Willie Lee Jr.

DATE 1-30-75

ADDRESS

835 Poplar Street
Cincinnati, Ohio

DOCKET NO. B-743172

LEGAL RESIDENCE

Same

OFFENSE

Aggravated Murder,
Kidnapping & Robbery

AGE 17

PENALTY

DATE OF BIRTH 12-27-57

SEX M RACE Black

CITIZENSHIP U.S.

PLEA

EDUCATION 10th

VERDICT Guilty

MARITAL STATUS

Single

CUSTODY Remanded

DEPENDENTS Self

PROS. ATTY.

Claude Crowe

SOC. SEC. NO. 268-58-6660

DEFENSE COUNSEL

Albert Mechley
Fred Hoefle

FBI NO.

HSO #21079

FBI #665-764-N11

OSB #A-816-261

OSB NO.

DETAINERS OR CHARGES

PENDING:

None

CODEFENDANTS

(Disposition) Samuel Hall (Dell) JAR

DISPOSITION

DATE

SENTENCING JUDGE

PRELIMINARY INVESTIGATION

Indictment No. B-743172 Date Filed 1-17-75
 Investigated by Dell Case No. 23889
 Defendant BELL: Willie Lee Jr.
 Aliases (Court Name) None Co-Defendants Sam Hall
 Offense Aggravated Murder, Kidnapping & Robbery
 Plea Trial X
 Indicted for Same Date of Conviction 1-17-75
 Date Report Submitted
 Judge John W. Keefe, Thomas C. Nurre, Wm. R. Matthews
 Disposition and Date

A. LEGAL HISTORY

Previous Court Record

DATE	OFFENSE	COURT	DISPOSITION
4-15-71	Housebreaking	Juvenile Court	\$25 Fine & Costs Adjudicated Delinq.
7-10-72	Riding in Stolen Car	Juvenile Court	30 days House Arrest placed on Probation
10-18-72	Robbery	Juvenile Court	\$25 Fine & Costs work detail for 5 Saturdays
12-3-72	Violation of an Order of Court	Juvenile Court	Dismissed
2-5-73	Auto Larceny	Juvenile Court	Court Costs Official Probation
5-23-73	Trespassing	Juvenile Court	\$10 Fine & Costs restored to Probation
6-17-74	No Driver's License Illegal High Beam	Juvenile Traffic Court	\$10 & Court Costs 6 months driving license suspension

THERE ARE NO OTHER INDICTMENTS PENDING

* * * *

OFFENSE & COLLATERAL
INFORMATION THERETO

At approximately 11:00 P.M. on 10-16-74, Cincinnati Police Officers responded to an alert of "shots being fired" in the vicinity of 1046 Groesbeck Road in Winton Place. Shortly before that, a Mrs. Bertha Graber of the Parklane Apartments, 4201 Victory Parkway reported that her husband, Julius Graber, did not return to the foyer of their apartment building where she had been waiting while he parked their auto, a 1974 Chevrolet Malibu; furthermore, she indicated that prior to calling the Police she ascertained that the auto was not in its usual assigned parking place.

At the scene on Groesbeck Road where the shots were heard by occupants of a nearby apartment complex, Julius Graber, a 64 year old, male Caucasian was found by Investigating Police Officers lying face down in a wooded area a short distance from the highway at 1047 Groesbeck, the entrance of a rear access road to Spring Grove Cemetery. He was pronounced dead on arrival at Cincinnati General Hospital from gunshot wounds in the back of the head, face and hands. A subsequent autopsy confirmed that the cause of death was due to massive cranial hemorrhaging. His billfold was missing but other personal effects were found in his pockets undisturbed.

Subsequent investigation by Officers of the Homicide Squad of the Crime Bureau of the Cincinnati Police Department resulted in the apprehension of Willie Lee Bell Jr., a 16 year old, Black, male juvenile on 10-23-74; previously, his companion Samuel Hall, an 18 year old, Black male had been arrested by Dayton, Ohio, Police Department Officers on 10-17-74 in connection with an Abduction and Robbery offense in their community. In subsequent statements to the Cincinnati Police, both Hall and Bell admitted that they had abducted Graber from the Parklane Apartments parking area and after stealing his automobile, drove to the Groesbeck Road area where the offense occurred; however both Hall and Bell accused each other of actually firing the sawed-off shotgun, the

murder weapon at Graber. It was indicated that the second fatal shot struck decedent in the back of the head from extremely close range as he was kneeling or lying on the ground; the initial shot had wounded Graber in the hand and trunk.

After a hearing and psychiatric evaluation, Bell was bound over to the Grand Jury by the Hamilton County Juvenile Court which relinquished jurisdiction to the Court of Common Pleas.

Both Bell and Hall were indicted for Aggravated Murder, Kidnapping and Robbery (B-74312). Bell was tried before the Honorable Judges of the Hamilton County Court of Common Pleas: John W. Keefe, Thomas C. Nurre and William R. Matthews who found him Guilty as charged on 1-14-75 at which time a pre-sentence report and psychiatric evaluation were ordered under the appropriate sections of State of Ohio Revised Code, 2929.03.

Hall was tried by the Honorable Judges of the Hamilton Court of Common Pleas: Gilbert Bettman, Lyle W. Castle and Robert L. Black, Jr. who found him Guilty as charged on 1-21-75; they likewise complied with the appropriate sections of State of Ohio Revised Code, 2929.03 and ordered both a pre-sentence investigation and a psychiatric evaluation.

For the past 10 years, Julius Graber, the decedent, was Executive Director of the Glen Manor Nursing Home in Roselawn which was formerly known as the Reformed Jewish Home for the Aged. The auto involved in the Instant Offense was provided for Mr. Graber in his capacity as Director by the trustees of the nursing home who appointed Mr. Irvin Zimov after his demise as interim director. It is indicated that the Grabers were not of substantial means since the decedent continued to retain employment until his demise; however, payment of funeral expenses was available from a U.S. Treasury Note Mrs. Graber owned. Mrs. Graber suffered a stroke shortly after the occasion of her spouse's death and is presently being cared for by a married daughter who allegedly resides in New York; however, she will ultimately live in California with another daughter who is an

attorney. Trustees of the Glen Manor Nursing Home granted her a \$200 per month pension for life in recognition of her deceased husband's years of devoted, competent service; in addition she will receive a Social Security allotment from the Federal Government which will comprise her total income.

Commander of the Homicide Division of the Cincinnati Police Department, Lieutenant Dan Cash, is of the opinion that the defendants should receive the maximum penalty provided for by law.

DEFENDANT'S VERSION OF THE OFFENSE

Bell's version of the offense centered around the fact that he and Hall had socialized at the Community Center in Roselawn on the day of the offense; allegedly they had been touring the area in a Pontiac automobile belonging to a relative of Hall's. At this time there had been conversation about obtaining a motor vehicle since neither had one of their own that was driveable. They left the White Castle Restaurant on the corner of Dana and Montgomery at approximately 9:30 P.M. and proceeded to the area of the Parklane Apartments on Victory Parkway where they followed the Graber auto to the parking lot which is contiguous to the building itself. According to Bell, Hall then removed a .20 gauge sawed-off shotgun from his coat after pulling up behind the Graber vehicle. Alighting from the Pontiac, he pushed the weapon into the window of the vehicle and ordered Graber out. After obtaining the keys from the ignition, the rear deck lid was opened and Graber was ordered to enter after remonstrating that his wife was waiting for him in the foyer. Bell denied any knowledge of the weapon or what Hall's intentions were and indicated that he was afraid not to comply with Hall's directions. The pair then returned to Hall's home where they left the borrowed vehicle which Hall had driven and drove to Groesbeck Road with Bell as the driver of the Graber vehicle. He insists that he followed the directions of Hall to the Groesbeck Road address and backed into the access road so that Graber could get out of the back of the

vehicle without being seen it was his opinion that Hall was going to release Graber at that point and take the car. However, according to Bell, Hall led Graber a short distance away into the woods at which time he heard a shot and a cry from the victim "Don't shoot me any more." Hall then allegedly returned to the vehicle and obtained another shell for the shotgun from the back of the vehicle and returned to the wounded victim at which time Bell heard a second shot. Hall then returned to the vehicle and ordered Bell to drive them to Dayton where they slept in the car.

The next morning, the pair entered a gasoline service station in the Dayton area at which time Hall left the vehicle armed with a loaded shotgun and ordered the attendant to get into the trunk compartment of the attendant's vehicle which was parked nearby. Bell related that he wanted nothing more to do with Hall at this point and decided to leave the area. He observed that the Dayton Police authorities had stopped the vehicle which Hall was driving which he had taken from the service station attendant. Bell then returned to the Cincinnati area and parked the Graber car on Beatrice Drive in a garage and returned to his home.

B. ANALYSIS OF ENVIRONMENT

CULTURAL & FAMILIAL BACKGROUND

The defendant is a native Cincinnati and was reared primarily during his formative years in the Avondale and Madisonville areas with the exception of a 1½ year period when he resided with his grandfather in Philadelphia. He attended Rockdale and Columbia Elementary grade schools in the Avondale area with marginal achievement and repeated the 3rd grade; in Philadelphia he attended Chester Arthur Jr. High School for the 6th and 7th grades where he achieved in more adequate fashion. Also while in Philadelphia he received a certificate of accomplishment for swimming activities. When he returned to Cincinnati, he attended Lyon Junior High School during the 8th grade and was promoted to the

9th from which he was expelled during the school year for disciplinary reasons. In 1973, he re-entered school at the McMillan Center in Walnut Hills where he completed the 10th grade with poor to fair grades.

Due to a turbulent situation in the home setting, he was shunted from pillar to post and on occasion stayed with his grandmother on Burnet Avenue and with various relatives including his grandfather. Although he was considered dull normal in intellectual capability, school counselors felt that he could achieve at a higher level had the proper motivation existed in the home setting. The defendant relates that during his early youth, he belonged to the Boys' Club in the neighborhood and was quite active in athletic activities including baseball and the usual playground sports. He related that youths of his own age seldom interested him and that he usually socialized with older individuals in an endeavor to emulate their more sophisticated achievements. As a result of such activity, he was involved in insubordination with a group of older boys which resulted in his expulsion from Lyon School. He observed that during his early years of adolescence, constant economic deprivation existed and he obtained employment at the Riverfront Stadium and other part time jobs to obtain spending money. It is indicated that he basically enjoyed school work, but felt frustrated and neglected due to his lack of the material items his fellow students possessed. However, while in Philadelphia, his dependency needs were adequately met and his grandfather indoctrinated him in church attendance which apparently had a positive effect on his social functioning and attitude; however, when he returned to Cincinnati his previous problems including frustration in his social functioning made themselves felt resulting in his becoming aware of his lack of material possessions others enjoyed.

The defendant was the third in a sequence of five children born to Willie Lee Bell and Roberta (Tubbs) 43 and 40 year old natives of Lauderdale, Mississippi and Bessemer, Alabama respectively. The defendant's father was a habitual indulger of alcoholic beverages who primarily functioned economically as a cab driver

in very inadequate fashion; from 1962 to 1968 he was on probation to the Hamilton County Adult Probation Department for Failure to Provide; after he was discharged from probation, he left the family circle and has not been functioning actively with them since that time. His mother, worked for several years for the Frisch's Restaurant in Avondale and the Quality Inn Motel in Norwood, a Frisch's development where she sustained a back injury several years ago for which she receives a disability pension. She began associating about 6 years ago with Joseph Sanford, a 35 year old native of Cincinnati, Ohio, who is employed at the Queen City Barrel Company. School records indicate that the home environment never provided the proper motivation or appropriate setting for the children to normally achieve. Kenneth and Robert, the defendant's 15 and 14 year old brothers respectively reside with Joseph Sanford and their mother at 835 Poplar Street in downtown Cincinnati. Formerly the family resided at 1025 Burton Avenue in Avondale where \$125 monthly rental was paid for a 5 room suite maintained in average fashion. Prior to that time they lived at 334 Forest Avenue and at 5422 Shelborne Road in Madisonville. Agency records indicated that the home usually displayed a fair degree of maintenance but offered a minimal reservoir of emotional strengths or resources from which the offspring might profit.

The defendant's 19 year old sister, Annette Bell resides alone at 402 Catherine Street and is sustained through the Hamilton County Welfare Department on an A.D.C. allotment for her illegitimate child. His oldest sister, Evelyn, 23 years of age, also resides in the Avondale area and is likewise sustained by A.D.C. as the mother of three offspring. The defendant's brothers and sisters are known to the Juvenile Court of Hamilton County and it is quite evident that the home situation did not provide adequate emotional strengths and an appropriate behavior model for the offspring. Both sisters are presently on probation to the Hamilton County Adult Probation Department for check charges.

The defendant's grandparents reside at 2024 Burnet Avenue and have apparently provided the most positive

impact on the defendant's personality and emotional development during his formative years; when he resided with them he allegedly attended church regularly and functioned in a proper disciplinary climate. Throughout his early youth and adolescence they were very interested in his welfare and related that they are unable to understand his present criminal involvement and predicament.

The defendant relates that he fathered a child by Janet Parks, a 19 year old individual who is a native of Cincinnati; however, he does not know her present whereabouts. At the time of the offense he was keeping company with an 18 year old Black, Ida Poelnietz, who resides at 129 West Nixon Street; she visits him as often as she is able to do so.

ECONOMIC & MILITARY ADJUSTMENT

Due to the defendant's youth, his industrial history is negligible. For a brief period of time he allegedly was employed at Coleman's Bowling Alley in a clean-up capacity and earned approximately \$25 per week. While his mother worked at the Quality Inn Motel in Norwood, the defendant was allegedly employed as a part time dishwasher at Frisch's Restaurant on Reading Road but no records were kept as to his adjustment. Personnel officials relate, however, that part time help is often hired without a record being kept, however the proprietor was unable to confirm the situation. During the summer, he was employed at Riverfront Stadium as a vendor. Overall, his industrial history is considered limited due chiefly to his youth and inexperience.

Willie avers that he wanted to enter Military Service when he became old enough and since early adolescence has been interested in a Military career.

C. THE INDIVIDUAL

PHYSICAL & MENTAL

Willie Lee Bell Jr. is a 17 year old, Black male who was born on December 27, 1957; he weighs approxi-

mately 140 pounds at his height of 5'7" and presents a small boned, but wiry physical appearance. He experienced the normal childhood diseases but at the present time apparently has no limiting physical disabilities. He relates that several years ago he was struck by an automobile at which time he received a head injury but there are no apparent complications.

While a student, Bell was referred for a psychological evaluation and on the Weschler Intelligence Scale for Children received a verbal I.Q. of 85 and a performance I.Q. of 80 with a full score average of 81 which indicated low average or dull normal intellectual capability. His abstract reasoning and concentration capability were rated average but general information, reservoir of comprehension and vocabulary were rated low. While in the 8th grade, he was found to be functioning in regard to arithmetic problems at the 6th grade level and on the wide range achievement test was functioning on approximately the same level of capability. During the 6th and 7th grades he achieved nearly a low "B" average in spite of significant absenteeism but during the 8th grade was absent 59 days and received "D" 's and "F" 's in all subjects; according to school records his low achievement was due chiefly to poor motivation and not lack of innate ability.

His personality evaluation was rated inadequate in areas of judgement, social awareness, and self-control with a low frustration tolerance and a low degree of maturity towards acceptance of responsibilities. As indicated on the Wechsler Intelligence Scale for Children, the wide variation in his scores indicated emotional instability; however, other criteria indicated that he probably had a higher true potential for learning than his previous scores indicated. Further evaluation indicated that his emotional and academic problems needed to be overcome before he would be capable of achieving at a higher level. It is also indicated that the defendant appeared quite rejected in his functioning and interpersonal relationships. Allegedly he attempted to deal with others through fantasy and withdrawal thereby becoming inaccessible to others. According to reports, he equates

strength and power with being masculine and much of his resentment is caused by his dependency needs being unfulfilled.

School records indicate that Bell displayed an acute need of positive relationships during his formative years and emotional strengths which might have been obtained through an older person were not forthcoming.

CHARACTER & CONDUCT

During 1971, 1972 and 1973 Bell was cited to Juvenile Court on seven occasions for offenses including House-breaking, Riding in a Stolen Car, Violation of a Court Order, Robbery, Auto Larceny, Trespassing and No Driver's License for which he received at various times probation, house arrest, or a fine without perceivable alteration of his behavior pattern. Although he profitted to some extent by the personality conditioning received with his grandfather and other relatives, there were minimal emotional strengths in the parental home from which the defendant could profit with the result that the majority of his character formation sprung from the environment of the street where he futilely strived to fulfill the dependency needs he so desperately required. School records in the past dramatically pointed out the direction in which Willie's behavior was pointing and quite accurately predicted his downfall to social oblivion. Positive interpersonal relationships were urgently indicated but were not obtained as agencies and his family did not follow through with recommendations from the school. As a result, Willie sought peer recognition from the streets and delinquent older associates which merely catapulted him headlong into antisocial activities. He relates that during the past two year period, he had been experimenting with Marijuana and L.S.D.; in fact on the night of the offense he had allegedly been using Mescaline, a hallucinogen. He further relates that he is not impressed with alcoholic beverages but on occasion has gotten drunk on beer or wine. He enjoys shooting dice occasionally or playing cards with peers but apparently

has no compulsion in the gambling area. His sexual expression has been characteristically normal with no apparent aberration of psychosexual responses. He is quite talented musically and relates that he can play nearly all instruments by ear which has been confirmed by members of his family. He particularly enjoys playing the piano and it is indicated that he is quite accomplished on this instrument. In addition, from a vocational point of view, he allegedly enjoys reading, interestingly enough, and all outdoor sports particularly swimming. He is of the Protestant religious persuasion and is a baptized member of the Church of the Lord Jesus Christ located at Reading Road and Washington Avenue under the pastorate of Bishop McDowell. He attends services occasionally but really became interested in religious activities while in Philadelphia living with his grandfather who insisted on church attendance two or three times per week.

Regarding his present involvement, it is not beyond the realm of possibility that Bell overidentified with the co-defendant, an older, more sophisticated individual to his detriment. There seems to be minimal hostile behavior in the defendant's background and a desire for peer acceptance may have provided the backdrop and caused his exploitation by others with more habitual criminal attributes. Summarily, there is no doubt that Willie Lee Bell Jr. possessed the intellectual capability to normally achieve and become a responsible citizen; however, his lack of emotional stamina and positive personality attributes which possibly could have been supplied by a strong, positively orientated personality were not forthcoming with the result that the defendant followed the path of least resistance to ignominy and his present role as pariah of society.

Respectfully submitted,

APPROVED:

/s/ Ernest H. Taylor
ERNEST H. TAYLOR,
Chief Probation Officer

/s/ William C. Dell
WILLIAM C. DELL,
Assistant Chief
Probation Officer

C. EXCERPTS FROM THE PROCEEDINGS IN THE
TRIAL COURT

PROCEEDINGS RE JURY WAIVER I [R. 5-8]

[5] (MR. MECHLEY: * * *) our client has informed us this morning—pursuant to some lengthy discussions with him over the past week, week and a half—that he wishes to withdraw his request for a jury and to proceed in this matter with a three-judge panel. I realize that has to be done in writing and we intended to do that but, again in keeping with the tenor of what the court has asked of us, we wish to advise the court as quickly as we knew, which was less than a half hour ago.

THE COURT: Have him come up here, Mr. Mechley.

MR. MECHLEY: Sure.

THE COURT: Mr. Whalen, I want you and Mr. Crowe up here, too.

MR. WHALEN: Yes. I'm sorry, your Honor.

THE COURT: Now, this presents, you know, an unforeseen situation here, in view of the fact that some 75 or 80 veniremen have been summoned. I am wondering if, before we examine him on that, you ought not to have the request executed in writing.

MR. MECHLEY: Fine.

THE COURT: That is what I think is the right way to do it.

MR. MECHLEY: I agree. I would suggest that.

THE COURT: It is right that you mention it, but I want to examine him to be sure.

[6] Mr. Bell, is this what you want to do?

DEFENDANT BELL: Yes, sir.

THE COURT: You understand that once you waive your right to trial by jury and you ask for three judges and you execute that waiver in writing and you do it intelligently, knowing what you are doing, then you cannot change your mind again. Do you understand that?

DEFENDANT BELL: Yes, sir.

THE COURT: And, Mr. Mechley, you and Mr. Hoefle understand that, too, that there cannot be any—

once he makes a waiver that the court considers a voluntary and effective waiver, then he cannot change his mind?

MR. MECHLEY: While one could debate that academically forever, that is not our intention. We discussed that with the client. While I can't agree with the court on a technicality, I have to respond I can't agree, but that is not the point.

For the record we discussed everything from preliminaries to investigation to trial to sentencing as it pertains to a jury, three judges, and one judge, which I don't think is even possible, and we have told this to our client. We have discussed it at great length—it was two or three hours up in the jail, at least on one occasion—and we asked him to reserve judgment until such time as he was satisfied that he had come to a complete decision. He did that and this morning he advised me and Mr. Hoefle, pursuant to our request and his voluntarily doing so, that he wanted to proceed with a three-judge panel. I am convinced he knows the alternatives to all this. I know I and Mr. Hoefle do. And for that reason I wanted to advise the court of this as soon as I had the decision.

THE COURT: Are the things that Mr. Mechley has just said to me in your presence all accurate?

DEFENDANT BELL: Yes, sir.

THE COURT: All correct?

DEFENDANT BELL: Yes, sir.

THE COURT: Well, the subject of a change of choice is academic, and I hope that it remains that way, but isn't the state's position the same as the court's, that once there is an effective waiver that you cannot come back and have a jury? I think that would be a travesty.

MR. WHALEN: Could we take a short recess and discuss this in chambers? I don't want to belabor the point, but—

THE COURT: I don't—

MR. MECHLEY: In response to that, I don't know if it is a good idea. If you want to discuss some general outline of something, fine, but I think as far as the record is concerned, if we are talking about anything

[8] pertinent to this man's request, which he has every right to make, that should be done on the record.

THE COURT: There has been no attempt to deny that.

MR. WHALEN: I don't deny he has a right to make that request at all.

THE COURT: We don't deny that. But the thing is, I want to obviate any possibility of an alteration of attitude, you see.

MR. MECHLEY: Your Honor, I think the court has the obligation—when we file this withdrawal—waiver of jury trial form—and I am sure the court knows this, since he has already mentioned this—to ostensibly interrogate the defendant as to whether or not that is his voluntary and intentional desire and whether or not he has conferred with us. We have already done some of that.

THE COURT: The record already reflects that and the court will do it again at the time you file your request in writing.

Now, I think that the orderly procedure, anyway, before that is done, is a determination on the sanity, so there is no question about the validity of that choice.

MR. MECHLEY: That was the other thing that was confronting us, your Honor.

THE COURT: All right. O.K. Now, we are ready to go on the sanity situation. . . .

* * * *

PROCEEDINGS RE JURY WAIVER II [R. 53-58]

[53] THE COURT: Counsel for the defendant earlier indicated to this court the defendant wants to waive his right to trial by jury and have these charges tried by a tribunal of three judges.

Now, has that manifestation of intention been reduced to writing, gentlemen?

MR. HOEFLE: Yes, your Honor.

THE COURT: Will you present it, please.

MR. MECHLEY: May it please the court, for the record we are presenting the court with a jury waiver and [54] application for trial by a three-judge panel, which I believe is self-explanatory—as the first aspect.

The second aspect is an affidavit of counsel, which, while the document speaks for itself, for the purpose of enacting that affidavit, I would like to read it to the court in front of the court, and I and Mr. Hoefle sign it in the presence of the court and our client.

It reads as, "Fred H. Hoefle and Albert Mechley, Jr., being first duly cautioned and sworn, depose and say:

"They are the court-appointed counsel for Willie Lee Bell, defendant in this matter, and have fully and completely advised him to the best of their ability of the various alternatives open to him in the defense of this matter, including his constitutional right to a trial by jury, by his peers"—I am sorry—"or, in the alternative, the right to demand a jury trial by a three-judge panel.

"After discussing the above alternatives at great length, providing the defendant with our recommendations, and giving the defendant approximately one week to think about his alternatives, defendant Willie Lee Bell has requested that we on his behalf proceed to demand a trial by a three-judge panel and thereby waive his right to a trial by jury.

"Signed Fred H. Hoefle, Albert Mechley, Jr., sworn to and signed in open day of court, this 10th day of January 1975."

[55] MR. HOEFLE: I am signing this H. Fred Hoefle, which is correct, as opposed to the typing on that.

MR. MECHLEY: I'm sorry, H. Fred.

MR. HOEFLE: That's all right.

THE COURT: Now, you call it an affidavit, which doesn't concern the court. Of course, there is no oath on it.

MR. MECHLEY: Well, there is, your Honor, at the top, and I think the effect of what we just did in open court performs that.

THE COURT: All right. The court is not finding fault with it. O.K.

Now, Mr. Willie Lee Bell, did you hear what Mr. Mechley and Mr. Hoefle just said?

DEFENDANT BELL: Yes, sir.

THE COURT: They have represented to the court, in your presence, that they fully and completely advised you, to the best of their ability, to the various alternatives open to you in the defense of this matter? Is that right? Have they discussed this with you at length?

DEFENDANT BELL: Yes, sir.

THE COURT: And you understand that you have a right to a trial by jury if you want it? Do you understand that?

DEFENDANT BELL: Yes, sir.

[56] THE COURT: And it is your free and voluntary choice and made in light of knowing what you are doing, that you want three judges to try the case instead of a jury trying your guilt or innocence. Is that right?

DEFENDANT BELL: Yes, sir.

THE COURT: You understand the penalty does not change and that you still have a possibility of being sentenced to the electric chair, whether it is three judges or whether it is a jury? Do you understand that?

DEFENDANT BELL: Yes, sir.

THE COURT: And this is still your decision, you waive your right to trial by jury?

DEFENDANT BELL: Yes, sir.

THE COURT: Let's see what he says here. "Defendant, by and through his court-appointed counsel, respectfully advises this court that he is effectively waiving

his right to a trial by jury of his peers, by demanding that this court try him by means of a three-judge panel.

"Defendant understands that he has a constitutional right to a trial by jury of twelve persons and that his demand for trial by a three-judge panel effectively waives his constitutional right to that jury trial."

Is that your signature on there, Willie?

DEFENDANT BELL: Yes, sir.

THE COURT: Did you sign that voluntarily?

[57] DEFENDANT BELL: Yes, sir.

THE COURT: All right. I think it is covered. Is there anything you want to ask him?

MR. WHALEN: The state is satisfied, your Honor.

THE COURT: Mr. Mechley?

MR. MECHLEY: Yes. In order to get you to sign this, did I promise you anything? Did I tell you that for certain, as a result of signing this, anything would happen, except that you would get a three-judge panel?

DEFENDANT BELL: No, sir.

MR. MECHLEY: Did Mr. Hoefle promise you anything?

DEFENDANT BELL: No, sir.

MR. MECHLEY: God help us, did the prosecutor promise you anything?

DEFENDANT BELL: No, sir.

MR. MECHLEY: Thank you.

THE COURT: All right. I don't think the court has to indicate anything on the waiver other than it just be filed.

MR. WHALEN: I will draw and present the entry, your Honor.

THE COURT: Present the entry which will recite that the court accepts the waiver.

MR. WHALEN: That and the court made the inquiry and is satisfied.

[58] THE COURT: I would like to have that entry—can I have it this afternoon?

MR. MECHLEY: My point, I thought it was done in open court.

THE COURT: Yes. There also ought to be an entry prepared for the signature of the presiding judge, Judge Morrissey, appointing two other judges.

MR. WHALEN: I will bring that up, also.

THE COURT: I know that counsel would be interested and curious to know who the other two judges are. The choice is in the hands of Judge Morrissey. I want to be forthright with you and tell you that I do believe one of them will be Judge William R. Matthews. I cannot tell you who the other one will be.

We will be together, then, Tuesday morning at 9:30, at which time I will hear the motion to suppress, following which—whether it is granted or overruled, I assume—following which, the trial will start by three judges.

O.K. I want those two entries today—at least those two entries this afternoon.

We will be adjourned.

(The case was continued until Tuesday, January 14, 1975, at 9:30 a.m.)

PENALTY TRIAL PROCEEDINGS [R. 491-583]

[491] MORNING SESSION, MONDAY,
FEBRUARY 3, 1975

JUDGE KEEFE: State of Ohio versus Willie Lee Bell.

MR. HOEFLE: For the defendant, your Honor.

MR. WHALEN: For the state, your Honor.

JUDGE KEEFE: Now, this court several weeks ago unanimously found the defendant, Willie Lee Bell, guilty of aggravated murder as charged in the second count of the indictment; guilty of aggravated robbery as charged in the third count; and guilty of kidnapping as charged in the fourth count. The court unanimously also found the defendant guilty of the specification to the second count.

Now, the law of Ohio, as we all know, provides that when death may be imposed as a penalty, the court shall require a pre-sentence investigation and a psychiatric examination to be made. And the court must require that these reports be submitted to it.

This court has directed such a pre-sentence investigation and a psychiatric examination and now the court wants to inquire of the state if it received the copies of the psychiatric examination and of the pre-sentence investigation.

MR. WHALEN: We have, your Honor.

JUDGE KEEFE: Now, Mr. Mechley and Mr. Hoefle, the court would like to ask you and your client if copies of the psychiatric examination and the pre-sentence investigation were received by you lawyers and by the defendant.

MR. HOEFLE: We have, your Honor. I don't know—Willie, have you received copies?

DEFENDANT BELL: Yeah.

MR. MECHLEY: We have, your Honor.

MR. HOEFLE: We have, your Honor.

JUDGE KEEFE: Let the record show the defendant indicated from his seat at the table that he also received a copy.

Now, the court is willing to hear testimony and other evidence and a statement, if any, of the defendant and arguments, if any, of the lawyers, and the defense and the state relative to the subject of the penalty which should be imposed on the offender with respect to the conviction of aggravated murder.

This court reminds defense counsel and the defendant that the defendant, if the defendant chooses to make a statement, is subject to cross-examination only if he consents to make such statement under oath or affirmation.

Now, my colleagues and I are aware of the fact that there has been filed by counsel for the defendant which is designated, "Motion for an Order Declaring Death Penalty Unconstitutional, Dismissing the Specification of Aggravating Circumstances from the Indictment and Sentencing Defendant to Life Imprisonment for His Conviction of [493] Aggravated Murder."

Now, the court would like to suggest to the defense that, in view of the fact that the psychiatrists have been subpoenaed to be here 45 minutes before the time the court was to convene on this case, and have now been in the courtroom about an hour, and because they all have busy professional schedules—this court would like to ask the defense if it is agreeable to developing whatever testimony is to be developed from the psychiatrists, both by the state and by the defense, and then excuse them, and then the court will afford a reasonable opportunity to the state and defendant to argue this motion which was filed this morning.

Is the defense agreeable?

MR. MECHLEY: Very agreeable, your Honor.

JUDGE KEEFE: All right, Mr. Mechley and Mr. Hoefle. What do you want to bring to our attention now?

MR. MECHLEY: Your Honor, in light of what the court has just suggested, I intended to make a few brief opening remarks.

JUDGE KEEFE: That is O.K.

MR. MECHLEY: But I would like at this time to say that we have no intention of calling the three psychiatrists.

JUDGE MATTHEWS: You have no intention of calling them?

[494] MR. MECHLEY: No intention.

JUDGE KEEFE: Does the state have any intention of calling them?

MR. WHALEN: We do, your Honor.

JUDGE KEEFE: Now, the defense at this posture is standing on the written report, which Doctor Whitman and Doctor McDevitt and Doctor Seymour filed?

MR. MECHLEY: No, your Honor. We have no intention of calling the psychiatrists. We aren't standing on anything.

JUDGE KEEFE: All right. But you have received—as you indicated previously, you have received the report and have had an opportunity to read it?

MR. MECHLEY: Yes, sir.

JUDGE MATTHEWS: The burden is upon the defendant to prove by a preponderance of the evidence one of the mitigating circumstances.

JUDGE KEEFE: O.K.

JUDGE MATTHEWS: And the defendant goes first.

MR. MECHLEY: We were just trying to go along with what the court suggested concerning the time of the psychiatrists. We would have no problem whatsoever if the court felt, in deference to the psychiatrists, if the prosecution wishes to call them at this time.

JUDGE KEEFE: Doctor McDevitt, Doctor Seymour, and [495] Doctor Whitman, the court is not unmindful of the busy professional schedule which you three gentlemen undoubtedly have. However, we would like to have you remain available at least for the next half hour or so, and then we will re-examine the posture of the developments at that time. So that we ask that you preferably remain in the courtroom, if you would.

All right. Mr. Mechley and Mr. Hoefle, will you proceed, please.

MR. MECHLEY: Thank you, your Honor.

MR. HOEFLE: Is this on the motion or the—if I may ask, what is our procedure? The motion first?

MR. MECHLEY: No; they want us to reserve that.

JUDGE MATTHEWS: Reserve the argument on the motion until after we have heard what we are going to hear on the mitigation.

MR. HOEFLE: Fine. Thank you, your Honor.

MR. MECHLEY: May it please the court, Mr. Prosecutor, Mr. Hoefle, Willie.

Your Honor, very briefly, we intend to demonstrate to the court a portion of Mr. Bell's background, Defendant Bell's background, in terms of his family, the fact that he lived with his mother during the majority of his life—certainly through the important years of puberty, absent a father, who left when he was approximately three years of [496] age.

As you are already aware, the defendant was born on December 27, 1957, which makes him 16 years old as of the date of the alleged offense; 17 years old at this time.

We hope to bring three teachers before this court, teachers who have known and been involved with Willie Bell, concerning his educative background and concerning further—in addition to the report that has already been submitted by Mr. William Dell of the probation department at the request of this court—his involvement with drugs, including glue, marijuana, pills, Mescaline pills, and other forms of speed and LSD.

We intend to demonstrate to the court that, as concerns the particular act with which he is charged, he had absolutely nothing to do in terms of active participation with that act; that he was strictly a passive participant in that act; and that the co-defendant in that particular case, in fact, admitted that he himself had killed Julius Graber, on at least two occasions, to police subsequent to that murder with which he is charged.

Thank you, your Honor.

MR. WHALEN: Your Honor, the state has no opening statement.

MR. HOEFLE: Your Honor, our first witness will be Roberta Bell.

[497]

ROBERTA BELL

having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HOEFLE:

- Q. Will you give us your name and address, please?
 A. Roberta Bell, 835 Poplar.
 Q. What is the address again?
 A. 835 Poplar.
 Q. Are you related to the defendant, Willie Lee Bell?
 A. That's my son.
 Q. You are his natural mother?
 A. Right.
 Q. What day was Willie born?
 A. December 27, 1957.
 Q. And who is Willie's father?
 A. Willie Lee Bell, Sr.
 Q. And does William Lee Bell, Sr., live with you at the present time?
 A. No.
 Q. I see. How long has it been since you and he have lived as husband and wife?
 A. I left in '61. He ain't been with me since.
 JUDGE KEEFE: Just a minute, Mr. Hoefle.
 Mr. Harris, if you can, move the lady up forward to that PA a little bit.
 [498] All right. I'm sorry. You may proceed.
 MR. HOEFLE: I have no further questions.
 MR. WHALEN: No questions, your Honor.
 JUDGE KEEFE: All right. You may step down.

(Witness excused.)

MR. HOEFLE: Your Honor, we would call the defendant to make an unsworn statement. We would appreciate the court's permission to do it in a question-

and-answer format to save time and make it more—give it more continuity.

JUDGE KEEFE: Just a minute, please.

All right, Mr. Hoefle. You may do it that way.

WILLIE LEE BELL

gave the following unsworn statement:

EXAMINATION

BY MR. HOEFLE:

- Q. O.K., Willie. Speak up so everybody can hear you, please.
 Could you give us your full name?
 A. Willie Lee Bell.
 Q. I see. Where did you reside before you were arrested?
 A. 1025 Burton.
 Q. Where is that?
 A. In Avondale.
 Q. Cincinnati?
 A. Yes, sir.
 [499] Q. I see. Since you were arrested you have been up in jail; is that correct?
 A. Yes, sir.
 Q. Now, what was your birth date?
 A. December 27.
 Q. What year?
 A. Fifty-seven.
 Q. And where did you live before you—or with whom did you live before you were arrested on Burton Street?
 A. My mother.
 Q. Was there anybody else in the family that was living with you?
 A. My two little brothers and my sister.
 Q. Has your father lived with the family?
 A. He has.

Q. I see. When was the last time, to the best of your recollection?

A. Oh, I don't know about ten years—seemed to me like that long.

Q. Now, did you go to school in Cincinnati?

A. Yes, sir.

Q. What schools did you attend?

A. Rockdale, Columbian, Ach, Schiel, Lyon, McMillan.

Q. Is McMillan the last school that you attended?

A. Yes, sir.

[500] Q. Where is that?

A. It's in Walnut Hills.

Q. Now Willie, in the past have you ever sniffed glue or been involved with drugs?

A. Yes, sir.

Q. And what was the first occasion? When was the first occasion that you either sniffed glue or got involved with drugs?

A. About three years ago.

Q. And what kind of—what did you use?

A. I started sniffing glue first.

Q. O. K. And how long did you sniff glue?

A. About a year.

Q. How frequently?

A. Every day.

Q. Every day?

A. Yeah.

Q. What kind of glue was this?

A. Model glue.

Q. What affect did it have on you?

A. It took me places, you know.

Q. What do you mean by that? Did it make you high?

A. Yes, sir.

Q. Did it make you feel better than you did before you sniffed it or worse?

[510] A. Yes, sir, better.

Q. Is that why you sniffed it?

A. Yes, sir.

Q. And when did you stop sniffing glue? You said it's been about a year?

A. Yeah. I sniffed glue about a year.

Q. Why did you stop sniffing glue?

A. I got tired of it.

Q. Did you go off of drugs or glue altogether at that point or did you—

A. No, sir.

Q. What did you do?

A. Started smoking marijuana.

Q. Anything else? Any other drugs?

A. Then after I was smoking marijuana for awhile I changed to pills.

Q. When you were on the pills did you continue to smoke marijuana?

A. Yes, sir.

Q. And why did you do that?

A. Well, if you combine both of them it's better than just one.

Q. I see. Now, you are talking about pills. Do you know what kind of pills these were?

A. Reds, OP's, Mescaline.

[502] Q. What is a Red? What does it do to you?

A. It's a down.

Q. Down?

A. Yes, sir.

Q. How does a down make you feel?

A. Relaxed.

Q. How relaxed? Do you fall asleep with them?

A. You can.

Q. You never took that many? Or did you?

A. I never did.

Q. Did you ever take enough to put you out?

A. No, sir.

Q. And you talk about OP's. What kind of pills are those?

A. They diet pills.

- Q. Are those downs or ups?
 A. They ups.
 Q. How do they make you feel?
 A. More into things, you know.
 Q. Were you more or less excitable after you would take an up or an OP?
 A. More.
 Q. Any other drugs? I think you said Mescaline. What does that do?
 A. That's a down.
 [503] Q. And that has the same effect that you said the Reds have; is that correct?
 A. That's correct.
 Q. In fact it was Mescaline you took the night Mr. Graber was killed?
 A. Yes, sir.
 Q. Now, how long a period did you continue taking these pills and smoking marijuana after you started them—after you stopped sniffing glue?
 A. To the day I was arrested.
 Q. O. K. How frequently did you take these drugs?
 A. Every day.
 Q. Every day?
 A. Yeah.
 Q. So that it is your statement, then, that with either glue or pills or marijuana you were under the influence of some drug virtually every day for the last three years?
 A. Yes, sir.
 Q. Where would you get these drugs?
 A. From school, on the streets, at the center.
 Q. At the center, you said? What center?
 A. Hirsch.
 Q. Where is that?
 A. In Avondale, on Reading Road.
 Q. What kind of center is that?
 [504] A. It's a community center.

- Q. Is that where you first met Sam Hall the night Mr. Graber was killed?
 A. It that my first—
 Q. Is that the same center?
 A. Yes, sir.
 Q. You mentioned OP's and Reds and Mescaline. Were there any other drugs that you can think of that you have taken?
 A. Acid.
 Q. What does that do?
 A. It's up—but it's more—you get more out of it than you do OP's. It's like an OP.
 Q. And you also said you obtained these drugs and things in school. What school?
 A. McMillan.
 Q. At McMillan. From whom did you obtain them?
 A. From some students.
 Q. Were there any people that were not students at the school that were pushing drugs?
 A. Yes, sir.
 Q. And at the center who did you get them from?
 A. Friends.
 Q. And I think you also said on the street. Was there any particular place on the streets where you could get drugs?
 A. Yes, sir.
 [505] Q. Where specifically?
 A. On Burton.
 Q. On Burton?
 A. Yeah.
 Q. Right on your own little street there?
 A. Yes, sir.
 Q. Were drugs expensive?
 A. Not really.
 Q. Let's put it this way. You generally had enough money with you that you could get them? Is that correct?
 A. Yes, sir.

Q. Were they hard to find? Was it hard to find the people that had these drugs?

A. No, sir, not all the time.

Q. Now, you remember before the trial the three psychiatrists came up to see you?

A. Yes, sir.

Q. And do you recall telling them that the best thing that had ever happened to you in your whole life was when you got high?

A. Yes, sir.

Q. Is that true?

A. Yes, sir.

Q. Now, you remember seeing the doctors again, I think, last week after the trial?

[506] A. Yes, sir.

Q. Did the doctors ask you at that time anything about your past drug or glue or marijuana habits?

A. No, sir.

Q. Did they ask you how long you had taken drugs?

A. No, sir.

Q. In other words, the only time they discussed drugs with you is when you were examined prior to trial; is that correct?

A. Yes, sir.

Q. Now, when you went to school—you said that you had bought drugs at school. Did you take the drugs right there?

A. Yes sir, in school.

Q. O. K. Was there—in other words, when you were in school were you under the influence of drugs?

A. Yes, sir.

Q. Most of the time or daily or infrequently? How often when you went to school were you under the influence?

A. Most of the time.

Q. Do you recall the night of October 16, 1974, when Mr. Graber was killed?

A. Yes, sir.

Q. Did you take any drugs that night?

A. Yes, sir.

Q. And where were you when you took the drug?

[507] A. At the center.

Q. And what did you take?

A. I smoked some marijuana, took some Mescaline.

Q. And I think you said earlier that Mescaline is a down. Is that correct?

A. Yeah.

Q. Do you recall how you felt that night with the effects of the Mescaline and marijuana?

A. Relaxed.

Q. Do you think, Willie—let me ask you this. How long did that last—did that feeling last?

A. About two or three hours.

Q. And do you think that made you more willing to go along with Sam Hall that night?

MR. WHALEN: Objection.

JUDGE KEEFE: It will be overruled.

A. Yes, sir.

BY MR. HOEFLE:

Q. Did you make any of the decisions that night as far as to take the car or to put Mr. Graber in the trunk or to drive the car to where you drove it? Did you make any of those decisions?

A. No, sir.

Q. Who made those decisions?

A. Sam.

[508] Q. Now, directing your attention again to that night, were you afraid that night at any time?

A. Yes, sir.

Q. And at what point did you become afraid?

A. When I saw the shotgun.

Q. Now, you saw the shotgun several times that night, I think, didn't you?

A. Yes, sir.

Q. Which time did you become afraid of the sawed-off shotgun?

A. When he got out of the car.

Q. Now, which time—again you got out of the car several times?

A. In the garage.

Q. Was that before Mr. Graber was put in the car?

A. Yes, sir.

Q. And you said that Hall gave you instructions. Did you follow those instructions?

A. Yes, sir.

Q. Why?

A. Well, because I was scared.

Q. Do you think the fact that you were high at the time had something to do with your going along with them, with these instructions?

A. Yes, sir.

[509] Q. Do you think if you had been perfectly clear-minded you would have gone along with this scheme of Hall's?

A. No, sir.

Q. Did Sam Hall ever tell you that he intended to kill Mr. Graber before he actually did it?

A. No, sir.

Q. Now, did Mr. Graber say anything to you at all that night?

A. No, sir.

Q. Do you recall if he looked at you?

A. No, sir.

Q. You don't recall—or he didn't look at you? I'm sorry.

A. He didn't.

Q. Did he touch you that night?

A. No, sir.

Q. Did you touch him that night?

A. No, sir.

Q. Was Mr. Graber conscious the last time you actually saw him, personally?

A. The first time I seen him he was in the same condition.

Q. Was he alive?

A. Yes, sir.

[510] Q. Had he been wounded?

A. No, sir.

Q. Now, with respect to Sam Hall, did you know him very well before October 16?

A. No, sir.

Q. How did you know—how did you look at this guy? How did you—what did he mean to you?

A. Well, like a big brother.

Q. He was older than you?

A. Yes, sir.

Q. I think you told the psychiatrists or Mr. Dell that you sort of admired his style. Is that accurate?

A. Yes, sir.

Q. Now, when you were arrested you gave the police a recorded statement, which we heard in court, didn't you?

A. Yes, sir.

Q. And you also talked to the psychiatrists a couple of times?

A. Yes, sir.

Q. And you talked to Mr. Dell from the probation department?

A. Yes, sir.

Q. In each of those statements did you tell the truth?

A. Yes, sir.

Q. Willie, how do you feel about this now, looking back [511] on it?

A. Sorry.

MR. HOEFLE: That is all we have from the defendant, your Honor.

JUDGE KEEFE: O. K. Step down.

(Witness excused.)

MR. HOEFLE: Our next witness, you Honor, will be Mr. Nick Dellecave.

NICK C. DELLECAVE

having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HOEFLE:

Q. Could you give us your full name and address?

A. Nick C. Dellecave, 3022 Wardall Avenue.

JUDGE KEEFE: Spell your last name.

THE WITNESS: D-e-l-l-e-c-a-v-e.

JUDGE KEEFE: Thank you.

BY MR. HOEFLE:

Q. How are you employed, sir?

A. I'm a teacher at McMillan Center.

Q. And where is McMillan Center?

A. 608 East McMillan Street, close to Walnut Hills.

Q. O. K. Is that the old Board of Education Administration Building?

A. Yes, sir.

[512] Q. What kind of school is that?

A. It's a special school; it's classified as special school.

Q. And what is the purpose of the special school?

A. The purpose, as I see it, is to help students that can't cope with normal school situations for some reason or another.

Q. I see. Is this like Conditt School, a school for the physically handicapped?

A. No.

Q. What type of handicap do these children have—or if it is a handicap—at McMillan?

A. I guess you would classify it as emotional.

Q. Are these persons considered—these students considered by the School Board as normal children?

A. In what respect?

Q. Well, emotionally or psychologically normal.

A. Emotionally, I would say, no.

Q. How long have you been a teacher, Mr. Dellecave?

A. This is my third year.

Q. In that time could you estimate for the court how many students you have taught?

A. Please?

Q. Can you estimate for the court during that time how many students you have taught?

[513] A. Hundreds.

Q. And you are familiar, are you, with the manner in which average, normal children act and behave?

A. I believe so, yes.

Q. May I ask you how old are you?

A. I'm 27.

Q. And I would assume, then, that you also—in your 27 years—would know how normal, average adult people behave?

A. Yes.

Q. Do you know the defendant, Willie Bell?

A. Yes.

Q. How do you know Willie?

A. Through school. He was a student of mine.

Q. O. K. How long have you known Willie?

A. Approximately a year and a half, maybe a little more.

Q. And was he a student up at McMillan?

A. Yes.

Q. How frequently would you see Willie?

A. I had him one class a day. I saw—he attended class pretty regularly.

Q. Would you see him in school outside of that class occasionally?

A. No, I wouldn't.

Q. How many were in a class up there, on the average?

A. The average class attendance is around ten students, [514] eight students, something like that.

Q. Would you see him at other times during the school day other than in your class?

A. Around the school, in the halls, cafeteria.

Q. Can you describe for the court Willie's general behavior and his mannerisms, how he acted?

A. He had kind of a I-don't-care attitude; he was always tired, kind of listless; he always appeared to be tired to me when he was in class. He didn't initiate too much.

Q. I see. Do you have a problem up at McMillan Center generally with students who take drugs?

A. Yes.

Q. And you have seen a lot of these children yourself, I suppose?

A. Yes.

Q. Could you say that Willie appeared to be on drugs when he was at McMillan?

A. Yes.

Q. And would you consider Willie emotionally stable for his age at that time?

A. No.

Q. Then, by adult standards, would you consider him as emotionally stable as a normal adult?

A. No, I wouldn't.

MR. WHALEN: Objection.

[515] JUDGE KEEFE: Overruled. The answer stands.

BY MR. HOEFLE:

Q. Would you consider Willie mature for his age or as mature for a normal person of his age?

A. No.

Q. And would you again, considering Willie by adult standards, consider him a mature person?

A. No, I wouldn't.

Q. You testified, in your opinion, that Willie was under the influence of drugs. How frequently would that be?

A. It was most of the time I saw him he would appear to be under the influence of something.

Q. And I think you testified his attendance was fairly regular?

A. Yes, it was.

Q. O. K.

A. I'm saying for my class now.

Q. How many days a week does McMillan operate?

A. Five days a week.

Q. And the usual school year, nine months, whatever?

A. Yes.

MR. HOEFLE: No further questions.

JUDGE KEEFE: Any cross, gentlemen?

MR. WHALEN: No cross-examination.

JUDGE KEEFE: All right, Mr. Dellecave. You may [516] step down, sir.

(Witness excused.)

MR. HOEFLE: Our next witness is Mrs. Eva Montgomery.

EVA MONTGOMERY

having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HOEFLE:

Q. Please state your name and address, please.

A. It's Eva Montgomery, 3949 Kirkwood Avenue, Kennedy Heights.

Q. That is in Cincinnati, isn't it?

A. Yes.

Q. What is your occupation, Mrs. Montgomery?

A. A teacher at McMillan Center.

Q. Could you describe for us what your interpretation of the purpose or function of the McMillan Center is?

A. McMillan Center is a school for disruptive youth. Youths who cannot function in regular schools are transferred to McMillan.

Q. Are these youths that have any physical problems or physical handicaps?

A. Not physical, no.

Q. How would you describe it?

A. They are emotionally immature—that's the goodest word—and unable to adjust or are experiencing severe adoles- [517] cent problems.

Q. Are these children considered by the school board as normal children?

MR. WHALEN: Objection.

JUDGE KEEFE: Wait a minute now. Wait a minute.

MR. MECHLEY: Your Honor, may I perhaps help the panel on this?

JUDGE KEEFE: We are willing to hear from you.

MR. MECHLEY: It is my opinion, and I think it is supported by the sections applicable here, that this is not a normal hearing in the sense of various evidentiary standards which we would use in trial. I think the court is aware that it says—

JUDGE KEEFE: Overrule the objection.

BY MR. HOEFLE:

Q. Are these children considered normal by the school board?

A. No, they are not.

Q. How long have you been a teacher, Mrs. Montgomery?

A. Twelve years.

Q. And in that time can you estimate how many children you have taught?

A. Thousands.

Q. Are you familiar with the manner in which common, normal children behave?

[518] A. Yes, I'd say so.

Q. May I ask how old are you?

A. Forty-one.

Q. In your 41 years you have noticed how average, normal adults behave also; is that correct?

A. Yes, I have.

Q. Now, do you know Willie Bell, the defendant in this case?

A. Yes.

Q. How do you know him?

A. I taught Willie a year and a half.

Q. O. K. Where was this?

A. At McMillan Center.

Q. And how frequently would you see Willie at McMillan?

A. Well, three or four times a week for one hour a day, during lunchtime and in the mornings before school.

Q. Could you describe for the court Willie's general behavior or his mannerisms, how he acted?

A. Willie was emotionally immature. He was generally docile, apathetic—just—well, drugged or down.

Q. Has Willie admitted to you that he takes drugs?

A. Yes. Willie was in my homeroom and we had a lot of conversations.

Q. I see. Do you have an opinion as to whether Willie was under the influence of drugs at school?

[519] A. I would say all the time. He was always down or coming down. He tried hard to work with you, but he just couldn't.

Q. When he was down would he be more suggestible and easier to manipulate?

A. Yes, he would. He was just—as I said, he had a I-don't-care attitude. He was down most of the time and slouching—

Q. And when he was in that condition would he argue or be belligerent at all?

A. No. He was never aggressive or never involved in anything, any fights or anything.

Q. When he was down he would do just what you told him?

A. He just wanted to be left alone, with his head down.

Q. O. K. Would you consider, Mrs. Montgomery, Willie emotionally stable for his age?

A. No.

Q. Would you consider Willie, then, emotionally stable by adult standards?

A. No, I would not.

Q. Would you consider him mature for his age?

A. No.

Q. Would you consider him mature by adult standards?

A. No.

MR. HOEFLE: No further questions.

[520] CROSS-EXAMINATION

BY MR. WHALEN:

Q. Mrs. Montgomery, what period of time was it that you had this contact with Willie Bell?

A. During a year and a half of a school year, from September of '73 to September '74 and January—January, February—January—the end of the school year '73 and '74 and the fall before, a full school year and a half.

Q. So would it have been the full school year of '73? Is that correct?

A. Yes.

Q. And part of the school year of '74?

A. Yes.

Q. From September till when?

A. Till—well, December, the end of the school year, at the end of '73 and the beginning of '74, January through May.

Q. So the last contact you had with Willie Lee Bell would have been, say, June of '74? Is that correct?

A. No. I saw Willie in September of '74 and October. He came around the school and I talked with him.

Q. Was he a student at that time?

A. No.

Q. How many times did you have a contact with him in September and October?

[521] A. I would say twice.

MR. WHALEN: Thank you.

MR. HOEFLE: One more question.

JUDGE KEEFE: O.K.

REDIRECT EXAMINATION

BY MR. HOEFLE:

Q. Mrs. Montgomery, isn't it a fact that the last time you saw Willie was after Mr. Graber had been killed?

A. Yes, it was after.

Q. Isn't it true that Willie was at the time you saw him at McMillan Center—on that occasion was under the influence of drugs?

A. Yes, I would say he was.

MR. HOEFLE: No further questions.

JUDGE KEEFE: You are at McMillan Center now, Mrs. Montgomery?

THE WITNESS: Yes.

JUDGE KEEFE: How many students do you have up there currently? If you don't know exactly, roughly how many?

THE WITNESS: Approximately a hundred and seventy.

JUDGE KEEFE: About a hundred and seventy?

THE WITNESS: Yes.

JUDGE KEEFE: From what ages to what ages, roughly?

THE WITNESS: Roughly from 15 to 17, but there are three programs. Our program is upstairs. There's another [522] program downstairs of about eight hundred and a pregnant-adolescent program of, I'd say, about a hundred.

JUDGE KEEFE: Thank you very much. You may step down.

(Witness excused.)

MR. HOEFLE: Our next witness is Mrs. Cheryl Vilas.

CHERYL VILAS

having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HOEFLE:

Q. Mrs. Vilas, could you state your name and spell your last name, please?

A. My name is Cheryl Vilas, V like in Victor, -i-l-a-s.

Q. What is your occupation, Mrs. Vilas?

A. I'm a teacher at McMillan.

Q. And is this McMillan Center?

A. Yes.

Q. Could you describe for us in your own terms what kind of a school McMillan is?

A. Just as Mr. Dellecave and Mrs. Montgomery stated, it's a school for kids that can't adjust to regular school. That means cope in one way or another. So they are referred to our school.

Q. Are you speaking because of physical problems?

A. No; emotional problems, family problems.

[523] Q. How long have you been a teacher, Mrs. Vilas?

A. Five years.

Q. Could you estimate for the court the number of children that you have taught in that time?

A. Hundreds.

Q. And you are familiar with the manner in which average, normal children behave?

A. Yes.

Q. And may I ask how old you are?

A. Thirty-two.

Q. In your 32 years you have also dealt with adults and you would know how average, mature adults would behave?

A. Yes.

Q. Do you know Willie Lee Bell, the defendant in this case?

A. Yes, I do.

Q. How do you know Willie?

A. He's a student in my classroom.

Q. How long have you known him approximately?

A. About a year and a half.

Q. How frequently would you see Willie at school?

A. Pretty frequently. He was in my—one of my classes, but I'd see him in the hall and in the cafeteria.

Q. Throughout the day?

A. Yes.

[524] Q. How was his attendance?

A. He had good attendance.

Q. How about his work?

A. There were days when Willie just couldn't get it together to work. There's some days when he could.

Q. Now, have you had occasion at McMillan and perhaps other schools to observe children who were under the influence of drugs?

A. Yes.

Q. I see. Would you say or could you give us your opinion on whether or not Willie had ever used drugs in school?

A. Yes, he had.

Q. How frequently would you say?

A. I'd say most every day. That's why he couldn't get it together to work.

Q. Could you relate to the court—I believe there is an incident when Willie was hitchhiking. Can you relate that to the court?

A. I was on my way home and Willie was kind of out in the street thumbing on Reading Road and so I picked him up and he told me he was like really messed up, that he was tripping on acid, and I said, "Well, I think I'd better take you home," and I took him home.

Q. Could Willie conceptualize things? Was it easy for him, especially when he was on drugs, to know what was going on?

[525] A. No, not really. That's why he had so much trouble getting, you know, getting himself together to do some work. I think, you know, when—well, I didn't see him too often when he wasn't on something.

Q. Did you see him on this occasion that Mrs. Montgomery discussed in October after Mr. Graber was killed?

A. Yes.

Q. And was Willie under the influence of drugs at that time?

A. As far as I could tell, yes.

Q. Just the same as he had been?

A. It seemed worse. Willie used to be kind of chubby and then he just—he really looked burned out.

Q. Now, would you consider Willie emotionally stable for his age?

A. No.

Q. By adult standards would you consider him emotionally stable?

A. No.

Q. How would you describe him with reference to the maturity of the average 16-year-old child?

A. I think that Willie has had quite a few problems. I think that's why he was in our school and I don't think—as far as him being mature for a 16-year-old, no.

Q. Would he be mature by adult standards?

[526] A. No.

MR. HOEFLE: No further questions.

MR. WHALEN: I have no questions.

JUDGE KEEFE: O.K. Mrs. Vilas, you may step down.

(Witness excused.)

MR. HOEFLE: Our next witness will be Shirley Ratliff.

SHIRLEY RATLIFF

having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HOEFLE:

Q Will you state your name and spell your last name, please?

A. Shirley Ratliff, R-a-t-l-i-f-f.

Q. And what is your occupation, Mrs. Ratliff?

A. School psychologist.

Q. How long have you been so employed?

A. Four years.

Q. Did you have occasion in 1972 to prepare an evaluation of Willie Bell, the defendant?

A. Yes, I did.

Q. I see. And what did you do in making this report? What kind of preparation did you make before you made your report?

A. You mean on the tests—

Q. What did you do with Willie—

[527] A. A test usually—or an evaluation usually includes interview, observation of the student during the interview, or in the hall or somewhere else if I see him, possibly in the classroom, tests of various types, mental abilities, achievement and projective testing.

Q. And these were done with Willie?

A. Yes.

Q. O.K. And did you interview him?

A. Yes, I did.

Q. Did you ultimately prepare a report based on the tests and the interviews?

A. Yes, I did.

MR. HOEFLE: Will you mark this.

(Defendant's Exhibit No. 1, 2/3/75, was marked for identification.)

BY MR. HOEFLE:

Q. I show you what has been marked for identification purposes as Defendant's Exhibit No. 1. Is that a true copy of the report you prepared? Take your time and look it over, please.

MR. MECHLEY: Your Honor, while she is looking at that, we have already given the prosecutor a copy of that report.

A. Yes.

MR. HOEFLE: I have no further questions of the [528] witness, your Honor.

MR. WHALEN: No questions, your Honor.

JUDGE KEEFE: O.K., Mrs. Ratliff. You may step down.

(Witness excused.)

MR. HOEFLE: Your Honor, I would like to offer this for whatever consideration the court would give it. I have copies prepared for the court.

JUDGE KEEFE: It may be admitted.

(Defendant's Exhibit No. 1, 2/3/75, heretofore marked for identification, was received into evidence.)

JUDGE KEEFE: Next witness.

MR. MECHLEY: Detective Tom Jones.

TOM JONES

having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MECHLEY:

Q. Give the court your full name and address, please.

A. Tom Jones, 2470 Daily Road, Columbus, Ohio.

Q. By whom are you employed, Mr. Jones?

A. Columbus, Ohio, Police Department.

Q. In what capacity, sir?

A. The homicide division.

Q. What is your rank with the homicide division?

A. Detective.

[529] Q. How long have you been with the Columbus Police Department?

A. Nineteen years.

Q. I see. Would you describe just briefly the various roles you performed as a police officer with the Columbus Police Department during those 19 years?

A. All acts of violence.

Q. That could be misinterpreted.

Detective, would you tell me if you happened to come in contact with the co-defendant in this case, a man by the name of Samuel Hall?

A. I did.

Q. In what capacity? In what manner did you come into contact with him?

A. Mr. Hall was in custody in Montgomery County when I talked to him.

Q. This is in Dayton?

A. Dayton, Ohio.

Q. Would you tell the court why you happened to be talking to him?

A. We received information from the Montgomery County Sheriff's Department that Samuel Hall wanted to give us information on a crime which was committed in Columbus, Ohio.

Q. And did you have an opportunity then to interview Mr. Hall?

[530] A. Yes, sir.

MR. MECHLEY: Would you mark this.

(Defendant's Exhibit No. 2, 2/3/75, was marked for identification.)

BY MR. MECHLEY:

Q. Let me show you what has been marked for identification as Defendant's Exhibit No. 2, and ask you if you can identify that?

A. Yes, sir.

Q. What is it?

A. This is a folder I had with me when I talked to Mr. Hall and I took down notes as he was telling me certain things.

Q. So that the handwriting on that folder is your handwriting?

A. Yes, sir.

Q. What was the first date that you came in contact with the defendant, Hall?

A. October 28, in the morning hours, of 1974.

Q. This is in Montgomery County?

A. Yes, sir.

Q. Did you have an opportunity to discuss with him the things that were of concern to you in the Columbus Police Department?

A. Yes, sir, I did.

Q. O.K. Would you tell me whether or not he offered [531] to you any information or any additional statements other than those concerning what you were talking to him about?

A. Yes, sir, he did.

Q. Did you make any—did you ask him any questions which led up to his making these particular statements about the information contained in the statements he made to you?

A. In reference to the crime here?

Q. That is correct.

A. No, sir, I did not.

Q. Did you make any reference whatsoever to the death of Julius Graber?

A. No, sir.

Q. Did you make any reference whatsoever to Willie Bell?

A. No, sir.

Q. Did you make any reference whatsoever to the—I'm sorry—to the City of Cincinnati Police Department?

A. No, sir.

Q. Could you tell us in terms of the time span of your interview with Hall, Sam Hall—at what time during that interview did he make these statements that you wrote down in your own handwriting on that envelope?

A. The first time I talked to him, I'd say, probably an hour.

Q. No. I'm sorry. What I am trying to get at, from the beginning or end or middle of your conference with him.

[532] A. Oh, this would be in the middle.

Q. In the middle?

A. Right.

Q. Would you tell the court exactly what he said on the 28 to you?

MR. WHALEN: Objection, your Honor.

JUDGE KEEFE: Overruled.

A. Yes, sir. He said to me to get information to Mr. Bell, who is the defendant in this case, to tell Bell not to tell the police that he shot the old man, tell him we were sitting on the porch at the time.

BY MR. MECHLEY:

Q. What was the reference to the pronoun he? Was the reference, as you understood it, to Hall or to Bell?

MR. WHALEN: Objection.

JUDGE KEEFE: Sustained.

BY MR. MECHLEY:

Q. When you wrote that down you wrote that down in your handwriting; is that correct?

A. Yes, sir.

Q. Would you tell the court—is that the statement exactly as he gave it?

A. Yes, it was.

Q. Repeat that statement exactly as he gave it.

MR. WHALEN: Objection.

[533] JUDGE KEEFE: Overruled.

A. "Tell Bell not to tell police he shot old man. Tell him we were sitting on porch at the time."

BY MR. MECHLEY:

Q. Now, was it your understanding that he was asking—he was asking you to deliver a message; is that correct?

A. Yes, sir.

Q. To Bell?

A. Yes, sir.

Q. So it was important to him that you understand the message; can we agree on that?

A. That's correct.

Q. Was it your understanding of the message that you were to tell Bell not to tell the police that Bell shot the old man or that Hall shot the old man?

MR. WHALEN: Objection.

JUDGE KEEFE: What a minute, Mr. Jones. Don't answer that.

We will sustain that, please.

BY MR. MECHLEY:

Q. Do you have an opinion as to how he meant shot the old man?

MR. WHALEN: Objection.

JUDGE KEEFE: Sustained.

[534] BY MR. MECHLEY:

Q. When did you have an opportunity to talk with Hall again?

A. It would be on the 31 day of October 1974.

Q. And at that time you discussed with him again the details of some particular fact situation that you were interested in as far as the Columbus City police were concerned?

A. That's right.

Q. During this conference did he again make certain proffers to you regarding the Julius Graber killing?

A. He did.

Q. Did you have an opportunity to write those down?

A. Yes, sir.

Q. Would you tell the court what he said?

A. He stated again, "Tell Bell in Cincinnati to keep his mouth shut. Don't tell police I did the shooting. Tell him we were sitting on porch."

He did not trust the Dayton police and, "Tell Bell he will say the same thing on killing the old man."

Q. Did you have any further conversations with Sam Hall regarding the statements?

A. I don't believe so, no, sir.

Q. This is the extent of the proffer of information to you regarding the Julius Graber killing?

A. That's correct.

[535] MR. MECHLEY: No further questions.

CROSS-EXAMINATION

BY MR. WHALEN:

Q. All right. Officer Jones, I believe you stated that there were two statements that you took from Samuel Hall. Is that correct?

A. That's correct.

Q. In one of them he stated, "Tell Willie Bell not to state he did the shooting." Is that correct?

A. That's correct.

Q. And the second statement is, "Tell Willie Bell not to say I did the shooting." Is that correct?

A. That's correct.

Q. Now, the second statement, "Tell Willie Bell not to say that I did the shooting," did you interpret that as a police officer in the investigation to mean that Samuel Hall was admitting that he did the shooting?

A. It was my opinion at the time.

Q. And if I told you, officer, that Samuel Hall stated, in fact, that Willie Bell did the shooting, would you interpret that differently then?

MR. MECHLEY: There will be an objection.

JUDGE KEEFE: We will overrule the objection.

MR. MECHLEY: Your Honor, may we be heard? Reference here is made—and I think this goes to the form of the [536] question and I am even willing not to concern myself with that—if he will mention the date and the time and the place that Mr. Hall made these statements. He is making reference to two statements made almost a week before the statement of this gentleman. It seems to me, even under good form, he has to tell this gentleman when those statements were made in order for this gentleman to intelligently answer this question.

JUDGE KEEFE: Are you willing to provide that information in your inquiry?

MR. WHALEN: Yes.

BY MR. WHALEN:

Q. Officer Jones, if I told you that at 5:20 p.m. on October 23, 1974, Samuel Hall stated, "Willie Lee Bell fired the shotgun," would that change your interpretation of that statement?

A. It might.

MR. WHALEN: Thank you. I have nothing else.

REDIRECT EXAMINATION

BY MR. MECHLEY:

Q. Officer, in order to let you play a complete game for Hamilton County, if I told you that on the 22 of October at 5:45 p.m. he said that Buzz Lukins shot this old man, would that change your statement?

A. I don't think so.

[537] Q. I don't either. As a matter of fact, his statement was taken—was volunteered; is that correct? It was not taken as a result of any indepth interrogation or any interrogation concerning Julius Graber?

A. Strictly voluntary.

Q. In fact, it came out of the blue as far as you were concerned?

A. That's correct.

Q. And it was given to you in the form of a mission or message to be given to Bell; is that correct?

MR. WHALEN: Objection.

JUDGE KEEFE: Overruled.

A. That's correct.

BY MR. MECHLEY:

Q. And as a matter of fact, it was given a week after both of the statements that both the prosecutor and I mentioned to you, is that correct, the 21 and 22; your two statements were given on the 28 and the 31?

A. That's correct.

Q. And the 31 statement reconfirmed the statement and the exact nature of the statement given on the 28, didn't it?

MR. WHALEN: Objection.

JUDGE KEEFE: Sustained.

MR. MECHLEY: No further questions.

JUDGE KEEFE: May I excuse the witness, gentlemen?

[538] MR. WHALEN: Yes, sir.

JUDGE KEEFE: O.K., Officer Jones. You may step down.

(Witness excused.)

MR. MECHLEY: Your Honor, could we have a photocopy made of those statements so the officer can take the envelope with him? We would like to offer that in evidence.

JUDGE KEEFE: Well, are you asking my staff to assist you in the preparation of the photocopy?

MR. MECHLEY: Yes, I am.

JUDGE KEEFE: All right. O.K. Mr. Harris will help you.

Call your next witness.

MR. MECHLEY: Your Honor, we would move the admission of the envelope, handwritten statement.

JUDGE KEEFE: Well, let's wait until they get back with the papers.

MR. MECHLEY: O.K. We rest, your Honor.

JUDGE KEEFE: All right, Mr. Prosecutor.

MR. WHALEN: We call Doctor Robert McDevitt. Your Honor, may I have the original report of the doctors.

(State's Exhibit No. 3, 2/3/75, was marked for identification.)

[539] ROBERT JOHN McDEVITT, M.D.

having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WHALEN:

Q. Doctor, would you state your full name and spell your last name, please?

A. Robert John McDevitt, M-c-D-e-v-i-t-t.

Q. And where are you presently employed, sir?

A. Good Samaritan Hospital, director of the department of psychiatry, 3217 Clifton Avenue.

Q. Doctor, can you give us a brief background as to your education?

A. Pre-med, Xavier University; medical school, St. Louis University, 1955; internship, Good Samaritan Hospital, '55 to '56; residence at the Ohio State, 1956 to 1961; certified by the American Board of Psychiatry and Neurology; fellow of the American Board of Psychiatry and Neurology; associate clinical professor at the University of Cincinnati; attending staff and director of the department at Good Samaritan Hospital.

Q. And for what period of time have you been director of the department of psychiatry at Good Samaritan Hospital?

A. Since 1970.

Q. Were you requested by the court to make an examination of the defendant, Willie Lee Bell?

A. That's correct.

[540] Q. How many examinations have you made?

A. Doctor Whitman, Doctor Seymour and myself examined Mr. Bell on two occasions; first before he stood trial as to the question of his competency to stand trial and after his conviction, using the Revised Code sup-

plied by Mr. Mechley to evaluate his—where he stood in terms of the new provisions of the law.

Q. Now, doctor, can you tell the court what you found in your examination or—let me strike that.

A. Which examination?

Q. That is just what I was going to get into. What was the date of your last examination of the defendant, Willie Lee Bell?

A. The last examination was on January 23, 1975. The previous one, I recall, was just a day before his birthday—I remember that rather distinctly. Doctor Seymour examined him on the 23. Doctor Whitman and I examined him on the 22.

Q. Now, in your examination on the 22 day of January 1975, will you tell the court as part of your examination what I.Q. you found the defendant to have?

A. Well, this is a rather controversial issue, but we—the first time we were under the impression that he was not very bright; the second time around—of course, he had been in jail for a number of weeks, apparently had been off of drugs and had been much more alert. We found he was very sharp; that [541] using the reverse-word test Doctor Whitman and I gave him, he did seven letter words, forward and backward, which would indicate an I.Q. of above average. Perhaps we—estimated perhaps a hundred ten, a hundred twenty, at that time.

Q. How does that stand in a normal I.Q. for a 17-year-old?

A. From our examination on the 22 he seemed a little brighter than average. On the previous examination he had been rather dull and unanimated.

Q. Were you ever able to determine any of the hobbies with which he occupies himself while in the jail?

A. Yes. He plays chess quite big.

Q. And could you determine as to how capable he is?

A. He's supposed to be the second-best player there; sometimes the first-best player, depending on who is there.

MR. HOEFLE: Objection and move it be stricken.

JUDGE KEEFE: Overruled. It may stand.

BY MR. WHALEN:

Q. Doctor, one of the questions you were asked to look into was the question of whether or not the victim of this particular offense induced or facilitated the crime that was committed?

A. I am not quite sure that that's our province to ask, but we did ask the question and found out the defendant gave no evidence—or at least no—told us that Mr. Graber in no way [542] said or did anything to provoke the incident.

Q. Were you able to determine whether or not at the time that this crime was committed Willie Lee Bell was, in fact, under any duress, coercion or strong provocation?

A. Again, this is one that we had great difficulty with, because we felt that—he initially told us that he was frightened of Sam Hall. Then when we questioned him he was not, but we found out that he was a young man who was easily led and we felt that there was strong motivation to follow along with Mr. Hall, but he was not aware of anything like this and could not verbalize any feelings in this respect. He admitted that he had not felt any fear but did claim that he was trying—had made arrangements at one time to get away.

Q. Were you able to determine at the time that this offense was committed that it was primarily the product of the offender's psychosis, of mental deficiency—

MR. HOEFLE: Objection to the form of the question.

JUDGE KEEFE: Overruled.

JUDGE MATTHEWS: You may answer, doctor.

THE WITNESS: Pardon me? Whether he had a mental psychosis at the time?

BY MR. WHALEN:

Q. Yes.

A. He did not.

Q. Or mental deficiency?

[543] A. As I understand mental deficiency, in terms of his intellectual ability, he did not. In a broader sense, he probably was not able to appreciate completely all the factors around him, and the one thing we did stress very strongly with him is, if he did not do anything actually, did he realize he was giving consent by passively accompanying the individual, and he claimed that he did not understand that this was giving acceptance to the behavior of Mr. Hall, and we struggled with him quite a bit with this, and he adamantly refused to accept any responsibility for accompanying Hall during this period of time.

Q. And this was the only area that you found he was unable to comprehend?

A. Right, yes.

MR. WHALEN: I have no other questions.

CROSS-EXAMINATION

BY MR. MECHLEY:

Q. Just briefly, doctor. I think you probably already answered it, but I notice some distinctions between your first report on the 30 and your subsequent report on the 23, and I believe you said that this may have been the result of the fact that he was still under the influence of drugs on the 30, or perhaps coming out of that.

A. No. I didn't mean to imply that, but I think, being in prison for this period of time and being away from drugs and being regular in his living situation, he seemed a lot clearer, a [544] lot more tuned-in; perhaps the focus of the second examination was a little different, too.

Q. So that it is a fact that, assuming one had been on drugs, assuming one had been drugged during that particular time, that the longer one could keep them off drugs, assuming a good diet and assuming a standard, ritual routine, assuming sometime later, 60 days, 80 days, 100 days, one would get a better report, a better idea of how they are handling themselves at that time?

A. Should, yes.

Q. Did you have an opportunity to consider in this report the issue of drugs?

A. No, we did not.

MR. MECHLEY: Thank you. No further questions.

JUDGE KEEFE: Anything further, Mr. Prosecutor?

MR. WHALEN: Yes, your Honor. Just one other thing.

REDIRECT EXAMINATION

BY MR. WHALEN:

Q. Doctor, the item you made reference to in what has been marked for purposes of identification as State's Exhibit No. 3, would you tell the court what that is?

A. State's Exhibit No. 3 is the report to the three-judge panel replying to their direction to examine him—examine him according to the Revised Code.

Q. And is this report prepared by you?

A. Yes, it is, Doctor Seymour, Doctor Whitman and myself. [545] There is an addendum by Doctor Seymour.

Q. And it was submitted by you to the court?

A. Right.

MR. WHALEN: I have no other questions.

JUDGE KEEFE: You may step down.

THE WITNESS: May I be excused?

JUDGE KEEFE: May I excuse Doctor McDevitt from the Courthouse?

MR. MECHLEY: Certainly.

(Witness excused.)

MR. WHALEN: At this time we will ask that State's Exhibit No. 3 be received by the court.

JUDGE KEEFE: It may be admitted.

(State's Exhibit No. 3, 2/3/75, heretofore marked for identification, was received into evidence.)

MR. WHALEN: Your Honor, we will not call the other two examining physicians.

JUDGE KEEFE: May I excuse Doctor Seymour and Doctor Whitman?

MR. WHALEN: Yes, Your Honor.

THE COURT: Mr. Mechley and Mr. Hoefle?

MR. MECHLEY: Yes, your Honor.

JUDGE KEEFE: All right, gentlemen. All three of you are excused, please.

MR. MECHLEY: Your Honor, at this time may we have [546] Defendant's Exhibit No. 2 put into evidence?

JUDGE KEEFE: Is that this (indicating)?

MR. MECHLEY: Yes, it is.

JUDGE NURRE: There is no objection?

MR. WHALEN: No, we have no objection.

JUDGE KEEFE: It is admitted.

(Defendant's Exhibit No. 2, 2/3/75, heretofore marked for identification, was received in evidence.)

MR. WHALEN: May we approach the bench a moment, judges?

JUDGE KEEFE: O.K.

(Discussion at the bench.)

JUDGE KEEFE: The court is limiting each side on the motion for an order declaring death penalty unconstitutional—the court is limiting each side to a maximum of ten minutes.

MR. HOEFLE: May it please the court, counsel, Willie, the Supreme Court, as we all know, in *Furman versus Georgia*, by a five to four vote, ruled the death penalty unconstitutional.

The judges were sort of divided. Justices Brennan and Marshall felt that the death penalty was unconstitutional under any circumstances, because it was cruel and unusual, and the other three of the majority judges, Douglas, White, and Stewart, felt that the penalty as it is presently, or [547] was presently then, composed was unconstitutional; that they did not have to reach the question of whether it was cruel or unusual, only the fact that the application was cruel and unusual.

But Mr. Justice Stewart stated in his opinion, "The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in

its total irrevocability. It is unique in its rejection of the rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity."

And that is from a judge that—one of the so-called swing judges, who did not say, "Well, it is cruel and unusual," but he did say it was just a renunciation that is embodied in our concept of humanity. So the old Ohio statute went out the window and the General Assembly set out to re-write the capital punishment into Ohio law to get around the Supreme Court decision or comply with it.

In other words, I think we can assume their intent was not to make it cruel or unusual. And the Supreme Court would have no problem.

One of the first things they did to make it less cruel was to abolish the provisions of mercy. You might [548] have expected them to keep it, but mercy in itself is no longer a part of the Ohio law. And certain factors which I think—particularly in this case—would lead to a strong argument that mercy should be extended is the youth of the accused, the fact that he cooperated with the police, the fact that he told the truth, and the fact that the state, despite the claims of its opening statement at the trial, came nowhere near proving that Willie Bell participated in the actual act of killing Mr. Graber.

These things, I think, could legitimately have been argued under the old law to mitigate toward mercy, but under this new supposedly less cruel statute we are precluded from so doing.

Now, the new statutes provide for separate trials for guilt and for penalty—or for punishment.

Now, I think the General Assembly felt that, "Well, if we do this, then perhaps the Supreme Court will not find that it is cruel and unusual." But California has a statute which was twice declared cruel and unusual by its own supreme court and by the Supreme Court, and that also provided for a separate trial. That included not only three mitigating factors but anything that the

defendant might want to put in there was permissible. That statute provided the death penalty shall not be imposed, however, upon any person who is under the age of 18 years at the [549] time of the commission of the crime.

That California statute became effective in 1970. It is much more liberal and, shall we say, less cruel than our present statute. Yet it has always been ruled unconstitutional, because it was cruel and unusual.

The final point, it had appeared to me—or at least I had been under the impression—that our new House Bill 511 was basically the Model Penal Code with just a few changes, and I found that is not the case. In the case in which we cited in our motion, *McGautha versus California*, upholding the death penalty in California not too long ago, at 402 U.S. 222, in the appendix, in one of the justices' opinions, the capital punishment portion, or the death penalty, for aggravated murder, or for whatever they call it in the Model Code is set out, and it also lists mitigating circumstances and aggravating circumstances. But, unlike the Ohio statute, I believe there are at least eight mitigating circumstances. Our legislature kept some of the mitigating circumstances. The three we had are also in the Model Penal Code.

I just want to read three that are not, that our General Assembly took out, under Sub-Section A, under the Model Penal Code, under the mitigations, was "The defendant has no significant history of prior criminal [550] activity."

Sub-section C provided as a mitigating factor, "The defendant was an accomplice in the murder committed by another person and his participation in the homicidal act was relatively minor."

And Sub-section H, "The youth of the defendant at the time of the crime."

These are three things that are present in the Model Penal Code, which are not in the Ohio—our new penalty code.

These factors, along with the California factors, indicate that, rather than being more cruel—or, pardon

me—less cruel and unusual, the new Ohio statute is, in fact, more so. They eliminated mercy. They bastardized the Model Penal Code, and in this case we feel, particularly because three of the Model Penal Code provisions would be precisely in point here, and, finally, there is a provision in the penalty statute which we feel makes it unconstitutional, because it, in effect, qualifies the right to trial by jury.

A defendant has a three-time better chance at mercy if he proceeds to trial before a three-judge panel, because your decision to put him in the electric chair would have to be unanimous. If one of the three-judge panel decides that the mitigating circumstances or a mitigating [551] circumstance is proved, his sentence must be life imprisonment. Therefore, the defendant, when confronted with whether or not to make the choice, is, I think, on balance, more likely to say, "Well, if I can persuade one of the three, it is a lot easier than persuading one, so I waive my right to a jury and elect to go before a three-judge panel."

This is not specifically considered by the Supreme Court, but certainly other decisions, which have held that any time you qualify a man's right to a trial by jury or make him undergo such an out-moded exercise, you violate his rights, and it must necessarily be unconstitutional.

Thank you.

MR. WHALEN: If it please the court, defense argues that there is no section now under our new statute for mercy, and yet when they refer to the judges hearing this particular hearing, they make the remark about if you find mercy.

I submit while the words may not be in there, as defense counsel has acknowledged, mercy is part of the new statute.

Notwithstanding a model penal code and notwithstanding what the State of California does, the Supreme Court of the United States upheld the death penalty to be unconstitutional in *Furman versus Georgia*. As a result of [552] that the State of Ohio Legislature changed

its statute. It is now in the form that it now exists under Amendment House Bill 511.

And I submit to the court that under the laws of our state and our country the statute as it exists now is presumed to be constitutional. There is no showing of anything in this motion that it is not. The fact it may have had it or deleted parts of it in the Model Code, the fact that it is not what California is doing, does not mean it is unconstitutional, and I submit the statute as it now exists is constitutional.

JUDGE KEEFE: Anything further?

MR. HOEFLE: Nothing further.

JUDGE KEEFE: Has your witness arrived yet?

MR. CROWE: One moment, your Honor.

No, he hasn't, your Honor.

JUDGE KEEFE: The court will take a brief recess. We do ask all involved to be available again in ten or fifteen minutes.

We will stand in recess for a few minutes.

(Short recess.)

MR. WHALEN: Your Honor, before I call the next witness, I wish to thank the court for its indulgence in this matter.

I call William Dunn.

[553] WILLIAM DUNN

having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WHALEN:

Q. Would you state your name and spell your last name, please?

A. William Dunn, D-u-n-n.

Q. How are you employed?

A. Detective with the Cincinnati Police Department Homicide Squad.

Q. How long have you been with the homicide squad?

A. For the past six years.

Q. How long have you been with the Cincinnati Police Department?

A. Twenty-three years.

Q. As part of your official duties as a detective of the homicide squad, on October 23, 1974, at approximately 5:20 p.m., did you take a statement from one Samuel Hall?

A. Yes, sir, I did.

Q. Is this in reference to the killing of Julius Graber?

A. That is correct.

Q. During this statement did Samuel Hall tell you who actually pulled the trigger of the shotgun?

MR. HOEFLE: Objection.

JUDGE KEEFE: Why?

[554] MR. HOEFLE: Perhaps it is premature.

JUDGE KEEFE: Are you withdrawing it?

MR. HOEFLE: Yes, your Honor.

A. Yes, sir, he did.

BY MR. WHALEN:

Q. And who did he tell you pulled the trigger of that shotgun?

MR. HOEFLE: Objection.

JUDGE KEEFE: Overruled.

A. He stated that Willie Bell, his partner, actually had pulled the trigger.

BY MR. WHALEN:

Q. Did Samuel Hall ever tell you that he, Samuel Hall, in fact, pulled the trigger of the shotgun that killed Julius Graber?

MR. HOEFLE: Objection.

JUDGE KEEFE: Overruled.

A. No, sir, he did not.

MR. WHALEN: I have no other questions.

CROSS-EXAMINATION

BY MR. MECHLEY:

Q. Officer Dunn, are you aware of the over-all investigation that was conducted in the murder of Julius Graber?

A. Yes, sir.

Q. Were you involved in that investigation?

[555] A. Yes, sir, I was.

Q. Are you aware of the fact that on October 22 or some two days—or one day, the day before the statement you took—a statement was taken of Samuel Hall by Detective Albert Williamson and Detective Charles Rutledge?

A. Yes, sir, that's correct.

Q. Have you read that statement?

A. I have listened to it, yes.

Q. So you are familiar with the fact that in that statement he accuses everybody from Buzz Lukins to three or four other people as to having wasted the old man; is that correct?

A. Yes, sir, he named several people.

Q. That is correct. And so that it would appear that as the days go on he gets more truthful?

A. That would be hard to say.

Q. You are not sure whether he has told the truth yet; is that what you are telling us?

A. I have no opinion on that.

Q. O.K. Would you have any opinion as to whether Samuel Hall or Willie Bell shot the old—shot Mr. Graber?

A. No, sir. I couldn't form an opinion as to who actually pulled the trigger.

MR. MECHLEY: No further questions.

JUDGE KEEFE: Anything further, Mr. Prosecutor?

[556] MR. WHALEN: No, your Honor.

JUDGE KEEFE: All right, Mr. Dunn. You may step down.

(Witness excused.)

MR. WHALEN: Your Honor, the state has no other witnesses.

JUDGE KEEFE: All right. Anything further for the defense?

MR. HOEFLE: No witnesses, your Honor.

JUDGE KEEFE: All right. The submitted motion for an order declaring death penalty unconstitutional, et cetera, is overruled.

Now, gentlemen, counsel for the state and counsel for the defense may now make whatever statements or argument they want to the court relative to penalty.

MR. HOEFLE: Your Honor, just to get the rules straight, before we start, it is my understanding, since we have the burden of proof, we will have the privilege of opening and closing.

May it please the court, members of the prosecution, Mr. Mechley, Mr. Bell.

Under Section 2929.04 of the Revised Code, it is incumbent upon the defense to prove by a preponderance of the existence of one or more of three facts and if those facts are proved to your satisfaction by a pre- [557] ponderance of the evidence, then Mr. Bell's life will be spared.

The first of these facts would be that Mr. Graber induced or facilitated his own death. We do not contend that he did. This is sort of, I think, an illusoriness in any aggravated murder situation, under the elements of that crime, that any victim would induce or facilitate his own death.

The other two are that it is unlikely the offense would have been committed but for the fact that Willie Bell was under duress, strong provocation and, third, the psychosis or mental deficiency, though the condition is insufficient to establish the defense of insanity.

Section 2929.03(E) indicates that in its consideration the court must consider the report from the psychiatrists and the probation department, the testimony, other evidence—whatever that means—statement of the offender and arguments of counsel. So, therefore, we feel that the arguments of counsel, if not equal, at least are considered to have some weight, unlike in a regular trial.

Now, on fear and coercion, Willie told you that Hall had the gun, that he was afraid. He was not afraid of Hall, he told the psychiatrists personally—he had no reason to be—till that sawed-off shotgun came out, and that, I would submit, would be all the reason for anyone in [558] the world to be afraid, in the proximity to Samuel Hall or, indeed, anybody else in possession of a loaded, sawed-off shotgun.

I think the state commented in its final argument in the trial about the purposes to which a sawed-off shotgun could be used. It is to kill people or to hurt people. And I think Willie was as subject to fear as Mr. Graber himself, perhaps somewhat less, since Hall had not directed it at him, but, at least, there was apprehension and fear.

Now, in respect to mental deficiency, the code does not define mental deficiency. It doesn't say what mental deficiency is. So under the statutes we must give it the normal, everyday usage. There is a statute that says unless otherwise defined words are to be given that.

Now, I remind the court of another statute that provides in criminal cases that statutes must be construed favorably to the accused, if there is any question. We have had recourse to Black's Law Dictionary to try to come up with a definition of mental deficiency, and we have come up with a lack or shortage or insufficiency relating to or existing in the mind, intellectual, emotional, or psychotic, as distinguished from bodily or physically.

Now, the first thing we must consider is the fact of Willie Bell's minority. When I speak of minority, I don't speak of race, I speak of age. The evidence is [559] uncontroverted—Mrs. Bell testified—that he was born on December 27, 1957, which would place him at the age of 16 years and some months at the time Mr. Graber was killed.

Now, the law has special provisions for minors, and what does the law call the condition of being a minor? Interestingly enough, it calls it a disability. A normal, average young man—we think of disability as someone being disabled, usually physically, and often mentally,

but it is considered by law a disability, and that is a legal term. Since this disability applies to all minors, we feel that an argument can be made and should be made that the mere fact that Willie Bell is 16 in itself is sufficient to permit this court to find a mental deficiency. It is not physical; it must be mental. There is no evidence of physical disability. The law says he is under a disability; therefore, it has to be mental.

Minors are not considered by the law to be as intellectually or as emotionally mature as adults, and it has made special provisions for them. This being so, the law holds that minors are mentally lacking and insufficient in relation to adults. For example, just a few—I was going to read every citation to you in the Revised Code by number where a minor is especially provided for, but we would be here until 3 o'clock.

[560] A minor cannot sue unless an adult does so as a next best friend. There are exceptions to that now with the reduction of the age to 18 for divorce, but generally a minor must sue by and through a next best friend and a next friend is a responsible adult. If, instead of suing someone, he is sued, a guardian ad litem must be appointed by the court. An adult if he wants to hold certain occupations—there is a whole chapter of the Revised Code, 4109—it indicates what occupations he may not participate in.

Now, we will concede that some of those are possibly based on the physical nature of young people rather than their mental or emotional state. A minor's contract is voidable by the minor, not by the adult with whom he deals. Why? Because they feel, and I think the law feels, that a minor is mentally deficient, or the possibility exists, at least, that he may make a contract which will be to his detriment and that he shouldn't be forced to deal with adults, because he is not intellectually and mentally equal to them.

A minor may not vote. He may not make a will. He may not serve on juries. He may not marry without an adult's permission. And again these qualifications and problems do not arise because of any particular minor's

physical disability; so, therefore, it must be because [561] the law considers a minor to be mentally deficient.

In criminal prosecutions a whole court system is set up, and the theory, as Judge Schwartz has said, is that Juvenile Court is to protect the minor, the offender. Exception is made in certain crimes for a child to be prosecuted as an adult. That happened here. But we submit the Revised Code sections of aggravated murder are adult sections and, likewise, the penalty section, and likewise the section that says mentally deficient. This is mentally deficient as an adult and we submit that a minor is, based on adult standards in the Revised Code, mentally deficient per se.

So the law recognizes that all minors are insufficient, lacking in intelligence, maturity, judgment, what-have-you, that doesn't put them on an equal footing with an adult.

You will recall in the argument on the motion we cited the California statute. They are protected, minors, from execution no matter what the crime or what the nature of it is. So we feel that Willie's minority, his youth at the time of the offense in itself necessarily is a mental deficiency within the meaning of all the Ohio laws, including this section providing for mitigation: that this disability upon proof of Willie's date of birth, which was uncontroverted and proved to a certainty, constitutes un rebuttable establishment to a preponderance of that [562] particular contention, that his minority itself is a disability and a mental deficiency. But the evidence did not stop there, and we brought evidence in, witnesses, to see whether or not we could show the court, and I think we did, that Willie is not only mentally deficient by virtue of his youth compared to an adult, but he is mentally deficient compared to other teen-agers as well.

Now, when we talk about mental deficiency, again, we are going not by the particular mental terms, but we are going by the average, everyday youth. I would assume that we can agree that there is a range of normality, and if you do not fit within that range of normality, you are deficient. You are either normal or you are not. There

is no such thing as being above normal—in the context of intelligence, perhaps, but not in the context of being mentally, emotionally mature. You are mature or you are not. You are either emotionally mature or you are not. Again, you may be above normal intelligence but you are not of normal maturity and stability, as, again, Black's Law Dictionary says, we are talking about an insufficiency.

Now, the Willie Lee Bell who is out there with Sam Hall on October 16, 1974, was under the influence of drugs. We heard evidence that was uncontroverted, that for approximately three years preceding the date of his [563] arrest, Willie was stoned on one thing or another. For a whole year, every day, he sniffed glue, and the way glue is sniffed, it is put in a paper bag, fumes are collected, then they are inhaled. The medical effect of it is to eat the brain away or dissolve the liquid, separating the brain tissue, and that didn't satisfy him. He went on to other things—uppers, downers, marijuana, sometimes, as he said, a combination, and he told the psychiatrists, "The best thing in my life that ever happened to me is when I'm high."

Now, we know from the teachers that he was stoned every day in school. His attendance was regular, so they did have an opportunity to observe him, and, when the state asked, I believe, two of the teachers, "Well, when was the last time you saw him," implying that Willie had dropped out of school sometime before, which was true, "which was the last time you saw that he was stoned," well, it happened to be during the week between Mr. Graber's killing and Willie's arrest. So this condition continued all the way through. We don't just have to take Willie's word for it, because the teachers saw it every day and they saw again even afterwards. He was under the influence of drugs.

Now, we have to consider two things about these drugs: No. 1, is he mentally deficient when he is on [564] drugs? And the evidence is, I think much more than a preponderance and uncontroverted that he is mentally deficient when he is on drugs; plus we have to consider the reasons that drove him to take drugs in the first place, and

that is his emotional problems. Is someone who is not mentally deficient likely to sniff glue every day for a year and thereafter take drugs, pills, marijuana, LSD, every day for the next two years, until he is physically prevented by his arrest and incarcerated from doing it?

That is a mental deficiency, too, whatever it takes to drive somebody to do that and put their mind chemically in such a state that they can hardly be said to be anything other than mentally deficient, when they are under the influence of the drug.

Now, we submitted Miss Ratliff's report from the Board of Education. This is back in 1972. We expected the state to comment on the time-gap there, but that was within the time when Willie was also on drugs. That examination was made when he was stoned, because he said he got stoned every day. The evidence from other people is that he did, also.

So the Willie Bell that took that test was in the same mental condition, we submit, as the Willie Bell that went with Hall and took Mr. Graber out to the cemetery and [565] stood there while Hall went back and slaughtered Mr. Graber.

He was depressed, he associated with older boys, many men he met on the streets, he had no father influence at home, and apparently he had the intelligence but not the ability to handle his problems. He couldn't, especially under drugs, realize dangerous situations. The psychiatrists indicate that in their first report, modified-diminished response to the seriousness of the situation. Again, this was after the arrest. Doctor McDevitt indicated himself that he was different the second time from the way he was the first time. That is the Willie that is a lot closer in mental ability or lack of it to the one that went with Hall on October 16. There was indicated in the probation report a lack of emotional stamina, a lack of positive personality attributes present in Willie, so that he followed the path of least resistance, with Sam Hall as with anybody else. The teachers said that he didn't give them a bad time. He was compliant, complacent, came to school stoned, very manipulateable.

Again, you don't get to McMillan Center if you are normal; if you are a student, you don't get there if you can adjust. You don't get there if you are emotionally secure. You get there only after you have given them [566] enough trouble that there is no place else to put you. So they put him in that context, in classes where there are, instead of 30 or 40 that we are used to, maybe 10 or 12 students, and even then what did he do? He didn't cope; he just slept or sat. He admitted to two of the teachers you heard that he took drugs. And I think by the nature of their calling and where they teach they know a drug user when they see one. They see a lot of them. They have also seen a lot of normal children in their years of teaching. They unanimously felt that Willie, even as to his own environment group and peer group, was less mentally equipped than the average, and, compared to an adult, even much more so than an adult.

And remember again that this is an adult statute we are dealing with, and I think when we talk about deviation from the norm, such as to consist or constitute a mental deficiency, we are talking about deviation from an adult.

He testified or told the court—and also the doctors the first time—that he was high on the night of October 16. He has been high, really, for the last three years of his life. At the trial the state's opening statement indicated a scenerio about what the state said that it was going to prove beyond a reasonable doubt really happened out there—I won't go through the details of it, but I think, as I argued in closing argument, the purpose [567] of this was to convince your Honors that Willie Bell was a cold-blooded animal who participated in the actual physical act of killing Mr. Graber.

Now, we heard the evidence and Doctor Jolly's testimony, and I think just about two answers demolished that theory completely. There was no evidence to prove that Mr. Graber was running. In fact, when he was wounded by the first shot, the evidence indicated that it could not have happened that way. As to the bruises, which the

state apparently felt necessarily involved Willie, the doctor indicated he didn't know how they got there. He could give no theory, and we submitted at that time that those bruises were occasioned when Mr. Graber was bouncing around in the trunk of that car.

So we feel, in summary, judging Willie as he is now and as he was on the night of October 16 against the requirements of the statute that we have carried the burden of proving to a preponderance that Willie Bell was mentally deficient on that night for a number of reasons: No. 1, his age; No. 2, the use of the drugs; and also that that contributed, as did his fear of Sam Hall, in his participation in this offense. His participation, such as it was, was a passive thing, the act of a young man who ended up looking up to the wrong type of older man, the wrong time of ideal, and went along with him, stoned [568] on drugs, a participant, and I think we can see from the psychiatric report, too, from especially Doctor Seymour's comments, that it was likely he was just an observer in his mind. He was so divorced from reality—he knew what was happening after it happened, perhaps, but he did not participate.

So, in summary, we feel that his youth itself, plus the fact that he was stoned on drugs at the time, as he had been every day for the prior three years, his general immaturity, constitutes proof to a preponderance of a mental deficiency, and that the decision of the court should not be death but life.

Thank you.

MR. WHALEN: If it please the court, defense has given you numerous reasons why a 16-year-old is incapable of functioning in the adult world, and they stated that he cannot be judged on equal footing with an adult, and they gave a number of examples.

Well, I submit to the court that this was not a contractual relationship that Willie Lee Bell had with Julius Graber. Perhaps in that kind of atmosphere he would not be on equal footing. We are not talking about the ability to go out and buy alcohol or to file suit. We are talking about placing a man in a trunk of an automo-

bile and taking him out to a cemetery where he was shot [569] with a shotgun. And I am sure it was some consolation to Julius Graber to know that the man that was accomplishing this was under some disability as has been described. I have searched and searched and have found nothing that says a 16-year-old cannot fire a shotgun into another human being or that he is not responsible.

We have heard a great deal about the special treatment he received because of his age and the pre-sentence investigation on Page 9 indicates the previous contacts that this defendant had with the Juvenile Court and it ends up by saying, "This occurred without preceivable alteration of his behavioral pattern."

We have heard talk before about the father figure that the court is supposed to represent. In fact, the court upheld that position. Willie Lee Bell was taken to Juvenile Court and a mental examination and a physical examination was done. His record was examined. It was only after these that the court determined that Willie Lee Bell should be treated as an adult and he was sent to this court.

He has been described as a man that was constantly stoned on drugs, and, yet, I submit that none of the testimony that the court heard today indicated that.

There has been indication that he used narcotics or he used drugs, but it was to the extent that when one [570] teacher picked him up when he was hitchhiking she was so concerned about this poor man's condition—or poor boy's condition—that she immediately did nothing more than drive him home.

The report of Shirley Ratliff, the school psychologist, on this poor boy—as the defense describes him as glue eating his brains away—the recommendations on the report that are before the court are two. One of them is that a conference should be held to provide him with the knowledge—or to provide him able to conform to expected school behavior. And the second one is his greatest needs appears to be a personal involvement with an individual who would be firm, constant and sincere.

Now, this is a poor man who is under a great disability, who is unable to conform, and yet these are the two recommendations that the psychologist makes.

Under the three sections that 2929.04 of the Ohio Revised Code sets out—the defense has already stated the first one—the victim of the offense induced or facilitated the crime. The defense has already said they are not concerned with that.

The second is that it is unlikely that the offense would have been committed but for the fact that the defendant was under duress, coercion or strong provocation.

[571] Willie Lee Bell told the psychiatrists that he was not afraid of Samuel Hall. And if the court gives any credence to the fact that there is a possibility that he was under a coercion here before the court, I will ask the court to consider that this man, less than 24 hours later, duplicated this same act in Dayton, Ohio, and there was certainly sufficient time for this man to leave that particular environment, if there was any fear.

As a matter of fact, he stated to the one probation officer that he liked Sam Hall's style; he enjoyed it.

The third thing that the court is to consider is that the defense was primarily the product of the defendant's psychosis or mental deficiency. We have had three experts submit a report to this court and their finding unequivocally was that they could find no product of psychosis or mental deficiency that caused this particular crime.

I think the defense summed up the situation when they stated that Willie Lee Bell cannot adjust, he never has and he never will. And they tell you that we want to paint this man as a cold-blooded killer. I can't believe this court can recall the evidence in the medical testimony without feeling that, indeed, it was a cold-blood animal that took Julius Graber's life. I don't think this court or any court or any other people will know exactly who pulled that trigger, but I will submit [572] that Samuel Hall has given several statements to the police and he has never said that he pulled that trigger. The closest he ever came was twice when he said

once, "Tell Willie Bell not to say that he pulled the trigger," and the next time, "Tell Willie Bell to say it wasn't me that pulled the trigger."

He indicated to the police that this was the man that pulled the trigger on the shotgun that took Julius Graber's life. This man has been described as a passive participant and that term has been used time and time again.

I submit to the court that that is like being a little bit pregnant. You can't possibly be a passive participant. You are either a participant or you are not.

The court recalls the testimony of the witness as to the position of these men in the automobile and that both of them were out of the automobile. There was no passive participation—not even Julius Graber who was begging for his life at the time out there at the cemetery.

I submit to the court when they take all this into consideration there is only one finding, that there has been no proving beyond a preponderance that any of these three criteria exist and only the maximum penalty is justified.

[573] Thank you.

MR. MECHLEY: May it please the court, just briefly, I would like to restate for the court something that I am sure all three members of the panel know better than I do. We are effectively in a civil proceeding at this moment, to the extent that the statute prescribes that we have the obligation of establishing by a preponderance of the evidence one of the three matters that have already been discussed by Mr. Hoefle and by the prosecutor, Mr. Whalen.

I simply wish to point out that while this has criminal aspects to this, the original case keeps coming up. We are in a civil situation at this point for the purposes of establishing this, and a preponderance simply means the greater weight of the evidence. I think that is important, because it has been my observation after some years that certain feelings tend to persuade a court room, whether it be on behalf of the jury or the jurists or the judges themselves and counsel.

I would hope that we understand that that is the burden here; that what we are talking about at this time is not what it takes to find him guilty in terms of the crime itself or whether or not the prosecution was successful in doing that—that is not given at this point. The court has given its ruling on that.

What we are talking about is by the greater weight [574] of the evidence will this man live or die, and that is where it is at, and I think we should keep our sights at that, because whether or not Willie was able to keep his sights on that at the time of Julius Graber's death is hardly an argument as to whether or not you three men should keep your sights on it or whether or not I or the prosecutors should keep our sights on it. And it appears that emotional arguments at this time is ill advised—if the system is to work at all and if we are talking about the potential of evils. To argue that because one man is evil, therefore his system should practice an evil heart is a little ludicrous, and, hopefully, beyond our system and beyond our age.

If there is any chance this sentence is cruel and unusual, I think it behooves the court to give every possible consideration to every fragment of evidence that the court has heard, even as, I think, the statute suggests these arguments for the purposes of seeing to it that, if possible, the evidence preponderates along those same lines.

I think Mr. Whalen even knows as well as I that the statute says the arguments are to be given equal credence with all the other evidence. He has not once told you that Willie Lee Bell pulled the trigger. He skirted around it. [575] He said nobody can tell you who did that. He said a lot of things, but he never once told you that he personally believes that Willie Lee Bell pulled the trigger.

There is a very important reason why he hasn't told you that, because he personally doesn't believe it, and I think that is important. It is just a shame that we have to do these things by negatives.

As to being a passive participant, both he and I have been passive participants whenever the court overruled one of our motions. He understands as well as I do what

passive resistance is, and it is possible to passively resist—

MR. WHALEN: I hate to object, but I wish counsel would quit giving me credit to what I know and don't know and limit his argument to this particular issue.

MR. MECHLEY: One can be found guilty to being a passive participant, but that does not mean one has to be sentenced to the electric chair for being a passive participant.

As to the recommendations he read you from the report, as is often the case, he failed to read—as where the conference is recommended, it says—and I will continue the quote for you—"and others to determine what changes, if any, have occurred by that time and what the school can provide to enable to conform to expected school behavior," [576] as to his present need, and added at the end, "A teacher, school counselor, big brother, or interested community member could possibly fill this role."

And, of course, all that has been suggested, to some extent, by the psychiatrists, and to some extent by the probation report and to some extent by Mr. Hoeffle, that that was the role, unfortunately, Mr. Hall was fulfilling at the time of the commission of this crime.

Relating to that now, that is the time that this court has to consider in evaluating Willie. It is what he was like then—not what he was like right now, but what he was like then.

I submit to the court that the most important evidence on that aspect is the evidence that leads up to that position, the evidence that brings you forward and, in a chronology of events, are best described by the people around him around that date.

Saint Thomas has told us that we know a thing by what it does, and I think every member of this panel—and perhaps every person in this courtroom—evaluates a person on the basis of his past performance as it comes forward to that moment in time in which they have to make a judgment. Unfortunately, you jurists are asked to evaluate a man that sits in front of you from a point in time before the crime to a point in time of the crime by [577] things that have been submitted to you since the

crime—a difficult posture to say the least and one, in my estimation, gets muddy in the minds of the jurists who look at a man who has been cleaned up, dried out, and fed for approximately 90 days, in a manner that has not been accomplished in his entire life.

I submit to you if you are going to evaluate this young man as he stands now or as he was evaluated a few weeks before December 30, you are going to miss the mark by a wide, wide margin.

I submit to you if you are going to sentence Willie Lee Bell to die in the electric chair, you should sentence the Willie Lee Bell that was present that night in the cemetery with Julius Graber; you should sentence the mind that was emotionally deficient at that time, not the mind that is perhaps still most insufficient. And that mind was best described, in my estimation, by the three teachers who came here for no particular reason, with no particular axe to grind, and by no particular person of any particular power. They said they had known Willie Lee Bell for some year and a half. They said further they could hardly think of the day—and I don't know where the prosecutor heard anything else—that they couldn't think of a day that he wasn't stoned or under the influence of drugs.

[578] These teachers vary in ages from 27 years to 41 years of age, and they are teaching at a special school, for a school of emotionally deprived children. I think you can take judicial notice that teachers in schools such as that are special teachers themselves. I submit to you they had a chance to observe Willie Lee Bell, and it is something like a snowball going downhill, wishing you could do something about it, but wondering what you are going to be able to do about it, except to guide it so it comes crashing down the valley without ruining anybody or hurting anybody. They described Willie as constantly down, constantly depressed, constantly influenced, constantly willing to react, either with no actions whatsoever or along the lines he has been directed by a person at that given time.

They seem to be talking about a different person here. There was some difference that Doctor McDevitt eluded to between the Willie in December and the Willie in January and the information provided by the teachers, and I heard them testify here today and I said to myself, "How in God's name can we be talking about one person? It sounds like two separate individuals. How can we have this huge discrepancy? How can we have this dicotomy in personality?"

Nobody has ever suggested he is a schizophrenic or [579] schizoid personality. How can we have it?

I think it is obvious, and I think Doctor McDevitt eluded to it, it is the presence and absence of drugs; it is drug dependency in light of an existing emotional instability in a 16-year-old boy.

Now, you have no guidelines, no definition, but you do have law—or Black's Law Dictionary, for whatever good that is, and Mr. Hoeffle has told you what it says about mental deficiency. It speaks of mental in not being physical, in being emotional or being intellectual. I suggest to you, therefore, that where it says a mental deficiency is a shortage or insufficiency in the mental area—not in the physical area, but in the intellectual or emotional area—it is talking about a shortage or insufficiency of emotional ability to correspond to the age of the person that we are dealing with. We have here, then, a mental or—I'm sorry, an emotional shortage or an emotional insufficiency, and whose words are, ideally, transferable, according to Black's Law Dictionary, and if that is true, that is what we are talking about.

Unfortunately, Doctor McDevitt told you they did not concern themselves the second time around with the drug problem. Why they didn't, I don't know, but they chose not to.

I submit to the court that that is a very, very, [580] very important aspect of this case. So important that it seems to me, if we are going to put Willie in the electric chair, we ought to fill him full of grass and Mescaline before we electrocute him so we are absolutely certain we are electrocuting the man who was involved in whatever manner with the death of Julius Graber.

Thank you very much.

JUDGE KEEFE: This court will consider the reports and the testimony and the other evidence, the statement of the defendant and arguments of the lawyers for the defendant and for the state, all of which have been developed in this morning's hearing.

The court expects to pass sentence sometime later today and due notice will be provided.

Mr. Harris, will you adjourn court for the morning.

(The case was continued in progress until the afternoon of the same day.)

[581] AFTERNOON SESSION

JUDGE KEEFE: Will you have the defendant come before the court, please.

Now, Mr. Defendant, I remind you that you have been found guilty of aggravated murder, aggravated robbery, and kidnapping, as charged in the indictment.

Although you made a statement in this courtroom a few hours ago, this court now wants to inquire if you have anything to say as to why sentence should not be pronounced against you, if your attorneys have anything to say as to why sentence should not be pronounced against you, or anything else that you want to say or anything else that your lawyers want to say at this time.

DEFENDANT BELL: No, sir.

MR. HOEFLE: No, sir.

MR. MECHLEY: Nothing, your Honor.

JUDGE KEEFE: This court sentences Willie Lee Bell, upon his conviction of aggravated robbery, as charged in the third count of the indictment, to the Ohio State Penitentiary, to serve a minimum term of seven and a maximum term of twenty-five years.

The defendant, Willie Lee Bell, on the fourth count of the indictment, is sentenced to the Ohio State Penitentiary, for commission of the crime of kidnapping, to serve a [582] minimum term of seven years and a maximum term of twenty-five years.

The sentences for the aggravated robbery, third count of the indictment, and for the kidnapping, fourth count of the indictment, are to be served consecutively.

This panel of three judges unanimously finds none of the mitigating circumstances listed in Division B of Section 2929.04 of the Ohio Revised Code has been established by a preponderance of the evidence. Therefore, it is the unanimous sentence of this court that you, Willie Lee Bell, be taken to the jail of Hamilton County, and within the next thirty days delivered by the sheriff of Hamilton County to the warden of the Ohio Penitentiary; that on the eighteenth day of July nineteen hundred and seventy-five the said warden shall cause a current of electricity of sufficient intensity to cause death to pass through your body until you are dead, all this in accordance with Ohio law.

Willie Lee Bell, you have a right to an appeal. If you are unable to pay the cost of an appeal, you have the right to an appeal without payment. If you are unable to obtain counsel for an appeal, counsel will be appointed without cost. If you are unable to pay the costs of documents necessary to an appeal, such documents will be provided without cost. And you have a right to have a [583] notice of appeal timely filed on your behalf.

It is assumed that there will be an appeal, and this court appoints the present counsel for the defendant to file the required notice of appeal and also immediately to present to this court an entry appointing present counsel as appeal counsel.

This court will stand adjourned.

(End of proceedings.)

D. OPINIONS BELOW

 OPINION OF THE SUPREME COURT OF OHIO
 REPORTED AT 48 OHIO ST.2d 270,

 358 NE2d 556

THE STATE OF OHIO, APPELLEE

v.

BELL, APPELLANT

[Cite as State v. Bell (1976), 48 Ohio St. 2d 270.]

Criminal law—Aggravated murder—Imposition of death penalty—Waiver of jury trial—R. C. 2929.03(C)(1), (2) and (E)—Constitutionality—Mitigating hearing—Relevant factors.

1. A defendant is not coerced or impelled to waive his constitutional right to jury trial by R. C. 2929.03 (C) (1), (2) and (E), under the provisions of which an offender who waives a jury trial need persuade only one member of the three-judge panel at the mitigating hearing to avoid imposition of the death penalty.
2. Relevant factors such as the age of the defendant and prior criminal record are among those to be considered by the trial judge or three-judge panel in determining whether the existence of a mitigating circumstance pursuant to R. C. 2929.04 (B) (2) and (3) was established by a preponderance of the evidence.

(No. 76-499—Decided December 22, 1976.)

APPEAL from the Court of Appeals for Hamilton County.

On October 16, 1974, at about 11:00 p.m., police discovered Julius Graber lying in the woods in Spring Grove Cemetery in Hamilton County critically injured from a shotgun wound to the back of his head. He was pronounced dead on arrival at the hospital.

Approximately one week thereafter, Willie Lee Bell, defendant-appellant, was arrested for the murder of Julius Graber. Samuel Hall, Bell's companion, was arrested the day after Graber's body was discovered. Bell was then a minor of 16 years of age, and Hall was an adult. Following proceedings in the Juvenile Division of the Court of Common Pleas, Bell was bound over to the Hamilton County Grand Jury and was indicted jointly with Hall on two counts of aggravated murder, under R. C. 2903.01, with specifications of aggravated robbery and of kidnapping pursuant to R. C. 2929.04 (A) (7). Bell entered pleas of not guilty and not guilty by reason of insanity.

Bell and Hall were tried separately. The trial court found Bell to be sane and competent to stand trial, overruled a motion to suppress any inculpatory statements, and accepted Bell's waiver of trial by jury and requested to be tried by a three-judge panel.

The record tends to reveal the following series of events. On October 16, 1974, Bell and Hall went to a community center in Cincinnati, following which they went to Hall's home to borrow his brother's Grand Prix Pontiac automobile. In that car, Bell and Hall proceeded to Victory Parkway, where they observed a 1974 blue Chevrolet. When the Chevrolet turned into a parking garage, Hall, driving his brother's car, did the same, and followed it to the second level of the garage. After the Chevrolet was parked, Hall got out of the Pontiac with a 20-gauge "sawed-off" shotgun and accosted the Chevrolet's driver, 64-year-old Julius Graber. Graber was forced into the trunk of his own vehicle, and Hall drove that car, with Bell following in the Pontiac, and parked it near his home. Bell parked the Pontiac at Hall's home, and then drove Graber's Chevrolet toward Spring Grove Cemetery. After driving past the cemetery,

Bell stopped, reversed direction, and then backed the car into a lane that went inside the cemetery premises.

At this point, Robert Pierce, Jr., a resident of an apartment building near the cemetery, had just returned from work and was sitting in the parking lot of the building listening to his car radio. Pierce observed a vehicle stopped in the cemetery with its parking lights on. He heard two car doors close, one after the other, turned his radio down to listen, and then heard a voice plead "Don't shoot me. Don't shoot me." Pierce turned his radio off, and shortly thereafter heard one shot, followed, after an interval, by a second shot. He then saw the interior light of the car go on, and a man enter the parked car on the passenger side and move behind the wheel. Pierce heard two car doors close, saw the interior light go off, and then watched the car leave the cemetery, without any lights. Pierce called the police, around 10:50 p.m., who subsequently discovered Graber.

Hall and Bell drove to Dayton, where they spent the night in the Graber Chevrolet. The following morning, Bell driving, they stopped at a service station to ask directions for finding work. After questioning the attendant, Bell and Hall left, but shortly returned. Hall then thrust a shotgun at the attendant, Kenneth B. Hardin, took the keys to Hardin's automobile, forced him into the trunk of his car, and drove it away from the station. Bell followed in Graber's Chevrolet. The Hardin car, however, was stopped by a State Highway Patrolman, and when Hardin pounded on the trunk lid, he was discovered and released by the officer. Hall was arrested, and the shotgun was found and removed from the car's interior. Meanwhile, Bell, who was still following, proceeded back to Cincinnati, abandoned the Chevrolet on Beatrice Avenue, and returned to his residence on Preston Avenue.

Approximately one week later, following the interrogation of Hall and other investigative effort, Cincinnati police appeared at the Bell residence. Bell was taken to police headquarters to answer questions in connection with the Hall investigation and was given his *Miranda*

warnings. When the answers to preliminary questions indicated a possible connection with Hall, Bell was again given his *Miranda* warnings. Approximately one hour later, Bell was given his *Miranda* warnings a third time on a printed "Notification of Rights" form, whereupon he signed the "Waiver of Rights" portion. Bell was asked to make a recorded statement, and was advised that he could have his mother present. Although Bell indicated that he did not want his mother present, the officer called Bell's mother to tell her that her son was involved in a homicide, a kidnapping and an armed robbery, and that he was going to be charged with the offenses. An offer was made to transport her to headquarters to be with her son when he made his statement, but she declined.

A recorded statement was taken from Bell which was eventually received in evidence. It confirmed most of the above factual details, but denied any intention of Bell to take part in a homicide. Bell conceded his presence during the kidnapping of Graber, but claimed he was not aware of the shotgun until Hall got out of the Pontiac in the parking garage to threaten Graber with it. Bell conceded driving Graber's car to the cemetery and backing into the cemetery lane, but insisted that it was Hall who removed Graber from the trunk, and that it was Hall who took Graber into the bushes. Bell said he then heard a shot and Graber pleading for his life. After the first shot, according to Bell's recorded statement, Hall ran back to the vehicle to get another shotgun shell and then returned to the bushes, whereupon Bell heard the second shot. Hall then drove Bell to Dayton where the incident with the service station attendant occurred. In his statement, Bell attributed the active part of the incident to Hall, but admitted following Hall in Graber's Chevrolet for some 20 minutes before Hall was stopped by the highway patrolman.

Additional expert testimony identified a shell casing found at the scene of the homicide as having been fired from the shotgun found in the car Hall was driving at the time of his arrest in Dayton, and also identified a

latent fingerprint from the outside window on the driver's side of the Graber car as being that of Bell's.

After Graber had been pronounced dead at the hospital, where attendants discovered that he had secreted money and other valuables in his shoes, his body was taken to the morgue. A post-mortem examination revealed that death had resulted from a wound to the rear of the head inflicted by a shotgun shell at near-contact range. Testimony established that the head and hand wounds Graber received were consistent with the theory that the fatal shot was fired while Graber's hands were clasped behind his head.

The defense offered only one witness, a Columbus police officer who had interrogated and taken several statements from Hall. The statements were not, however, offered in evidence at the trial, and the case went to the panel on the basis of the evidence presented by the prosecution.

At the conclusion of trial, the panel unanimously found Bell guilty of aggravated murder as charged on the second count of the indictment, and guilty of the specification to the second count, that the aggravated murder was committed during a kidnapping. Bell was also found guilty of the third and fourth counts of aggravated robbery and of kidnapping, respectively.

Following pre-sentence and psychiatric examination a mitigation hearing was held pursuant to R. C. 2929.03, *et seq.* The panel found that none of the mitigating circumstances specified in R. C. 2929.04(B) had been established by a preponderance of the evidence. Bell was sentenced to 7 to 25 years on the kidnapping charge; to 7 to 25 years on the aggravated robbery charge, to run consecutively with the first sentence; and to death by electrocution on the aggravated murder charge.

The Court of Appeals affirmed the judgment of the trial court, and the cause is now before this court as a matter of right.

Mr. Simon L. Leis, Jr., prosecuting attorney, Mr. Robert Hastings, Jr., and Mr. William P. Whalen, Jr., for appellee.

Mr. H. Fred Hoefle and Mr. Thomas A. Luken, for appellant.

PAUL W. BROWN, J. Appellant Bell raises ten propositions of law. The first three of these assert that Ohio's statutory scheme for the imposition of the death penalty is unconstitutional. That issue was decided by this court in *State v. Bayless* (1976), 48 Ohio St. 2d 73, and need not be reconsidered here. Those propositions of law are overruled.

Appellant asserts in his fourth proposition of law that he was unconstitutionally coerced into waiving his right to trial by jury by the provisions of R. C. 2929.03(C) (1), (2) and (E) which provide that if a defendant is tried by jury and convicted, then the trier of fact at the mitigation hearing is the one trial judge who presided over the jury trial; but, if the defendant is tried by a three-judge panel following a waiver of a jury trial, then the trier of fact at the mitigation hearing is the same three-judge panel.

Appellant contends that this statutory scheme coerces defendants, and coerced him, into waiving their right to trial by jury. Before a three-judge panel can impose the death penalty, it must unanimously find that the defendant has failed to establish the existence of one or more of the mitigating circumstances enumerated in R. C. 2929.04(B). Thus, if tried before a panel, a defendant need convince only one judge out of three that such mitigation existed. If, however, a defendant elects a jury trial, he must convince the sole trial judge at the penalty proceedings that a mitigating circumstance existed. Appellant asserts that this scheme impels defendants to select trial by panel, rather than by jury, because the dread of the death sentence is an overwhelming consideration.

A statutory scheme which deliberately or unintentionally chills the right to trial by jury cannot constitutionally be tolerated. Appellant relies on *United States v. Jackson* (1968), 390 U.S. 570, in which the United States Supreme Court held that a federal statute had such an impermissible chilling effect because it allowed

the death penalty in kidnapping cases where trial was by jury, but did not permit the death penalty where trial was by the court.

However, unlike the statute in *Jackson*, the death penalty is possible under the Ohio statute under both alternatives, and it may be avoided under both alternatives. Thus, we are confronted with only the arguably greater possibility of the avoidance of the death penalty by the requirement of unanimity within the panel, and not with its absolute avoidance as in *Jackson*.

Although appellant asserts that there is a greater possibility of convincing one of three judges on a panel of a mitigating factor than one judge alone, by the same logic, there is also a greater possibility of convincing one or more of 12 jurors of the absence of evidence of guilt beyond a reasonable doubt than so convincing one of three judges. If the first consideration inclines against a jury trial, then the latter inclines toward one. The balance struck by these competing considerations is for the judgment of the defendant and competent trial counsel.

As noted, this statutory scheme furnishes a choice for defendants. Presumably, if no choice were offered, coercion would not be alleged by appellant. We see nothing unreasonable or coercive in the statute: there are pros and cons with respect to each alternative. If a defendant feels uncomfortable with a jury as the trier of fact at trial and the trial judge as the trier of fact at the mitigation hearing, then he may elect a three-judge panel as the trier of fact for all the proceedings. We see nothing objectionable in providing the defendant with a choice, absent, of course, an allegation of ineffective trial counsel. No such allegation was here made.

Further, the Court of Appeals concluded from statistics in Hamilton County that, in actual practice, this statutory scheme does not coerce or impel a defendant to waive jury trial. We are presented with no contrary evidence. Appellant's fourth proposition of law is overruled.

Appellant asserts in his fifth proposition of law that a statement by a juvenile cannot be used against him at trial unless both he and his parents or guardian was in-

formed of his *Miranda* constitutional rights, and unless the minor was given the opportunity to consult with his parents, guardian or attorney as to whether he should waive those rights.

Appellant cites Indiana case law and apparently concedes that this proposition has no support in Ohio authorities. We decline his invitation to alter existing Ohio law. We perceive no requirement in *Miranda* that the parents of a minor shall be read his constitutional rights along with their child, and that, by extension, both parent and child are required to intelligently waive those rights before the minor makes a statement. Appellant's mother was given every opportunity to be with her son, and, after declining, her presence cannot be forced by police.

When a minor is sought to be interrogated, the question of whether he intelligently and voluntarily waives his rights cannot always be decided by the same criteria applied to mature adults. See *Haley v. Ohio* (1948), 332 U.S. 596; *In re Gault* (1967), 387 U.S. 1. Such criteria necessarily varies with certain factors as the age, emotional stability, physical condition, and mental capacity of the minor. Appellant was adjudicated competent to stand trial as an adult, and thus is not afforded as much protection as a very young or disabled child who is not as capable of intelligently waiving his rights.

We are impressed with the meticulous care with which the police approached appellant's rights. Appellant was advised of his rights three times, and, the last time, was asked whether he understood them. He indicated that he did, and signed a waiver of those rights. Appellant was informed further by the officer that he could have his mother present while making his statement, but he indicated he did not wish her present. The officer nonetheless phoned appellant's mother and informed her that her son was being held for involvement in a homicide, an armed robbery and a kidnapping, and asked further if she would like to be present when her son gave a statement. The officer offered her transportation to and from police headquarters, but she declined this offer along with the opportunity to be present at the interrogation. After

being informed of this conversation, appellant again declined to have his mother present when he gave his statement.

Upon review of the record, we find that the prosecution satisfied its burden of proving that the inculpatory statement by the minor appellant was made pursuant to an intelligent and voluntary waiver of his constitutional rights of which he was fully advised, giving due regard to the requirement that a minor be given even more scrupulous attention to the issues of voluntariness and understanding than an adult. Appellant's fifth proposition of law is overruled.

In his sixth proposition of law, appellant asserts that a juvenile's statement is involuntary and may not be used against him if both he and his parents or guardian have not been advised that he may suffer the death penalty with the use by the prosecution of the statement, and if he and his parents or guardian have not been advised that he may lose the protection of the Juvenile Court.

We find this proposition without merit. Appellant has cited no authority from any jurisdiction that supports it. The officer related to appellant's mother all of his knowledge at that point: that appellant was being held in connection with a homicide, a kidnapping and an armed robbery. Any further advice by the officer concerning the death penalty or Juvenile Court would have been pure, and perhaps improper, speculation since appellant had not yet given his statement. Accordingly, the six proposition of law is overruled.

Appellant argues in his seventh proposition of law that one who participates in an armed robbery and a kidnapping is not guilty of aggravated murder where the other participant takes the victim out his presence and deliberately kills him, absent evidence of the first participant's purpose to kill, or that he aided and abetted the actual slaying with the intent that the victim die.

Clearly there is ample evidence that appellant affirmatively assisted and acted to complete the murder. Appellant's denial could be reasonably disbelieved after considering all relevant circumstances, especially that Hall

was arrested the next day with a would-be victim in the trunk and appellant following in another car, presumably attempting to carry out the same scheme of murder.

The foregoing evidence is sufficient to sustain a finding of guilt because, under R. C. 2923.03(A)(2) and (F), one who aids and abets another in committing an offense is guilty of the crime of complicity, and may be prosecuted and punished as if he were the principal offender.

But, in this capital case, this proposition need not be overruled solely on the above grounds. The panel was not required to accept appellant's version of the murder. As the trier of fact, it was within the province of the panel to determine which was the credible evidence. Thus, the gist of appellant's seventh proposition is that the conviction of aggravated murder was contrary to the manifest weight of the evidence. Upon review of the entire record, we hold that there was ample, credible evidence from which the panel could have concluded that appellant actively participated in the murder. Appellant's own statement confirms his involvement in the kidnapping and the armed robbery, and concedes further that, after he drive into the cemetery, he asked Hall what was going to be done next. The court could reasonably disbelieve, as we do, that Graber lay quietly with his hands behind his head while Hall left him alone to return to his car to reload his shotgun. Evidence of bruises on Graber's body, appellant's statement to police, the physical circumstances of the slaying, and the testimony of the eyewitness Pierce all would have justified the panel's rejection of appellant's version and its conclusion that Bell either committed, or actively assisted in, the murder. The seventh proposition of law is therefore overruled.

Appellant in his eighth proposition of law contends that where the prosecutor fails to advise the defense counsel of the names, addresses and criminal records of witnesses after proper discovery requests, the trial court should not permit those witnesses to testify over objection, or, alternatively, should grant motions to strike such testimony. This proposition is not well taken. The record shows that in most instances the prosecution did not have

such information, but orally communicated the information to defense counsel as it was acquired. The trial court carefully examined the possibility of prejudice to appellant, and concluded that no such prejudice existed. This proposition of law is overruled.

Appellant asserts in his ninth proposition of law that a minor is "mentally deficient" within the meaning of R. C. 2929.04(B) (3), and therefore cannot be sentenced to death after a conviction of aggravated murder with specifications. The Revised Code does not define "mental deficiency"; therefore, unless usurped by a judicial definition, the term must be accorded its common, everyday meaning, keeping in mind that the statutory language defining mitigating circumstances must be strictly construed against the state and liberally construed in favor of the accused. See R. C. 2901.04(A).

However, we do not agree that a minor is *per se* "mentally deficient" within the meaning of R. C. 2929.04(B) (3). Such an intention by the General Assembly could have easily been provided for by clear and simple language. Upon review of the statute, we do not believe the General Assembly intended that a 17-year-old defendant is conclusively "mentally deficient." The ninth proposition of law is overruled.

In his tenth proposition of law, appellant alternatively argues that even if a minor is not *per se* "mentally deficient," for purposes of R. C. 2929.04(B) (3), the circumstances of this case establish by a preponderance of the evidence that the offense was a product of his mental deficiency, and that the imposition of the death penalty was error.

In considering this proposition, we will not limit ourselves, as appellant has, to the mitigating circumstances of mental deficiency. R. C. 2929.04(B) states:

"Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and

condition of the offender, one or more of the following is established by a preponderance [*sic*] of the evidence:

"(1) The victim of the offense induced or facilitated it.

"(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

"(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity."

The purpose of mitigation is to recognize that the punishment assigned for a criminal act may, for ethical and humanitarian reasons, be tempered out of consideration for the individual offender and his crime. *State v. Woods* (1976), 48 Ohio St. 2d 127. The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. *Williams v. New York* (1949), 337 U.S. 241, 247.

We will examine each of the three mitigating circumstances provided for in R. C. 2929.04(B) to determine if the evidence established that such a mitigating factor existed.

We need not spend much time or effort, though, in discussing R. C. 2929.04(B) (1) as there was no evidence whatsoever that the victim induced or facilitated the crime.

However, the two remaining mitigating circumstances merit consideration. It has been alleged that the mitigating circumstances under R. C. 2929.04(B) are unconstitutionally narrow because a number of very important factors, such as the age and criminal record of the defendant, appear to be irrelevant under the statute. We believe, however, that the Ohio statutory scheme can withstand this attack. The Ohio statutes, properly construed, permit the trial judge or panel to consider these factors at the mitigation hearing. Such a statutory construction is evident as R. C. 2929.04(B) states that "the death penalty * * * is precluded when, considering the nature and circumstances of the offense and the history, charac-

ter, and condition of the offender" (emphasis added), one or more of the mitigating circumstances is established. This conclusion is buttressed by the requirement that these statutory provisions be liberally construed in favor of the accused.

As used in R. C. 2929.04(B) (2), the terms "duress" and "coercion" are to be construed more broadly than when used as a defense in criminal cases. See *State v. Woods* (1976), 48 Ohio St. 2d 127.

There was evidence in the psychiatric reports that appellant was perhaps easily led by Hall. When combined with appellant's age, it is conceivable that all characteristics could establish the mitigating circumstances defined by R. C. 2929.04(B) (2). However, we believe the panel was justified and correct in finding that this mitigating circumstance was not established by the evidence. Even if it were believed that appellant was apprehensive of Hall and was "forced" to go along with the crimes, the hard fact remains that appellant could have very easily quit the scheme while following in another car. Further, it must be remembered that appellant and Hall were engaged in the same type of scheme the very next day when Hall was arrested. We agree with the panel that, after considering all relevant factors, the second mitigating circumstance was not established.

The third and final mitigating circumstance in the statute concerns the offender's psychosis or mental deficiency. While rejecting appellant's claim that a minor defendant is *per se* "mentally deficient," we do hold that a defendant's age is a primary factor in determining the existence of a mental deficiency. Senility, as well as minority, may well be relevant, and therefore properly considered, in determining whether the offense was a product of mental deficiency.

The sum of the evidence and testimony of the psychiatrists, psychologists, probation department, school authorities and others fails to sustain appellant's position that he suffered from a mental deficiency. Appellant's situation was unpleasant but not unfamiliar: an unsatisfactory home, absence of family or other supervision, drug in-

volvement, and inability to cope with school demands. Even when considered together with defendant's minority, all the factors do not establish a "mental deficiency" for the purposes of R. C. 2929.04(B) (3). Although appellant's environment was indeed undesirable, such conditions do not excuse or even mitigate aggravated murder. To hold otherwise would set a dangerous and misleading precedent for future defendants. We therefore agree with the panel and the court below that the aggravated murder was not the product of appellant's psychosis or mental deficiency, and therefore overrule appellant's tenth proposition of law.

Accordingly, the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

O'NEILL, C. J., HERBERT, CORRIGAN, STERN, CELEBREZZE and W. BROWN, JJ; concur.

OPINION OF THE COURT OF APPEALS
 IN THE COURT OF APPEALS
 FIRST APPELLATE DISTRICT OF OHIO
 HAMILTON COUNTY, OHIO

No. C-75068

[Filed Court of Appeals, Apr. 12, 1976, Clerk of Courts]
 STATE OF OHIO, PLAINTIFF-APPELLEE

vs.

WILLIE LEE BELL, DEFENDANT-APPELLANT

Appeal From the Court of Common Pleas
 Hamilton County, Ohio

OPINION

PALMER, J.

At about 11:00 P.M. on the evening of October 16, 1974, Julius Graber was discovered by police lying in Spring Grove Cemetery in Hamilton County, Ohio, critically injured from a shotgun wound at the back of his head. He expired in the ambulance on the way to the hospital. Approximately one week thereafter, the defendant-appellant, Willie Lee Bell, then a minor of 16 years of age, was arrested together with one Samuel Hall, an adult, for the murder of Julius Graber. Following proceedings in the Juvenile Division, not here in issue, Bell was bound over to the Hamilton County Grand Jury and was jointly indicted with Hall on two counts of aggravated murder contrary to R. C. 2903.01, with specifications of aggravated robbery and of kidnapping, and on separate counts of aggravated robbery and kidnapping. Counsel was assigned the indigent Bell, and pleas of not guilty and not guilty by reason of insanity were entered.

In subsequent proceedings, the trial court found Bell to be sane and competent to stand trial, overruled a motion to suppress an inculpatory statement, and accepted Bell's waiver of trial by jury and request to be tried by a three-judge panel. Trial then ensued, separate from that of Hall, at the conclusion of which the court unani-

mously found Bell guilty of aggravated murder as charged in the second count of the indictment, and guilty of the specification to the second count, viz., that the aggravated murder was committed while Bell was committing kidnapping. He was also found guilty of the third and fourth counts of aggravated robbery and of kidnapping, respectively. Following pre-sentence and psychiatric examinations, a hearing on mitigating circumstances was held by the panel pursuant to R. C. 2929.03 et seq., at the conclusion of which the panel unanimously found that none of the mitigating circumstances specified in R. C. 2929.04(B) had been established by a preponderance of the evidence. Sentence, including death by electrocution, was then pronounced and entered.

Appeal was timely filed, and counsel provided for appellant to prosecute this appeal. Nine assignments of error are presented, have been vigorously argued, and will be discussed serially *infra*, following a review of such of the evidence produced during the trial and antecedent proceedings as is necessary to provide a fundament for the disposition of the various questions of law raised thereby.

The record reveals a body of evidence adduced on behalf of the State, resulting from the testimony of some 20 witnesses and including the recorded statement of Bell, which tends to establish the following series of events. Earlier in the evening of October 16th, Bell and Hall had met at a youth center in Cincinnati to thereafter leave for Hall's home, where the latter borrowed his brother's Grand Prix Pontiac. After briefly stopping at a White Castle restaurant, the two proceeded to Victory Parkway, falling in column behind a 1974 blue Chevrolet. When the Chevrolet turned into a parking garage, Hall, driving his brother's car, did the same, to follow the leading vehicle to the second floor of the garage. After the Chevrolet was parked, Hall got out of the Pontiac with a 12 gauge "sawed off" shotgun and accosted the Chevrolet's driver, who proved to be Mr. Graber, the 64 year old director of the Glen Manor Home for the Aged. Graber was forced into the trunk of his own vehicle, and Hall drove their unwilling passenger, with

Bell following in the Pontiac, to Dana Avenue, where the Pontiac was then parked. Bell next entered Graber's Chevrolet and began driving it in the direction of Spring Grove Cemetery. At shortly before 11:00 P.M., Bell drove past an entrance to the cemetery, stopped and reversed directions, and backed the Chevrolet up a lane inside the cemetery premises.

At this point, one Robert Pierce, a resident of an apartment building on Groesbeck Avenue, near the cemetery, had just returned from work and was sitting in the parking lot of his building in his automobile listening to the conclusion of a baseball game. Through opened windows, he observed a vehicle stopped in the cemetery with its parking lights on. He then heard two car doors close, one after another, turned his radio down to listen, and heard a voice screaming "Don't shoot me; don't shoot me." He turned his radio off, and shortly thereafter heard one shot, followed after an interval by a second shot. He then saw a man enter the parked car on the passenger side to place himself behind the wheel. He heard two car doors closing, saw the parking lights extinguished, and watched the car proceed, without lights, out of the cemetery and onto Gray Road and away. At about 11:00 P.M. this witness called the police, who shortly thereafter discovered Mr. Graber, with the results heretofore related.

After Graber had been pronounced dead at the hospital, his body was removed to the morgue, where attendants discovered that he had secreted money and other valuables in his shoes. A post-mortem examination revealed that death had resulted from a wound at the rear of the head delivered by a shotgun held at near-contact range. Numerous pellets of #5 shot were removed from the body, and testimony was received that the wounds, to hand and head, were consistent with the fatal shot having been delivered while Graber's hands were clasped behind his head.

Following the fatal incident, Hall and Bell drove to Dayton, Ohio, where they spent the night in the Graber Chevrolet. The next morning, with Bell driving, they stopped at a service station in Dayton where they made

certain inquiries of the attendant, one Kenneth Hardin, about finding work. After conversation, Bell and Hall left, but returned following a short interval. Hall then thrust a shotgun at Hardin, relieved him of the keys to his automobile, forced Hardin into its trunk, and drove it away from the station. Bell followed in Graber's Chevrolet. The Hardin car, however, was stopped by a State Highway Patrolman for a defective muffler, and when Hardin pounded on the trunk lid, he was released by the officer. Hall was arrested and the shotgun removed from the vehicle's front seat. Bell, meanwhile, who still was following in the Graber Chevrolet when Hall was stopped, proceeded back to Cincinnati to abandon the Chevrolet on Beatrice Avenue (near his own residence on Preston Avenue) to which he then returned.

Approximately one week later, following the interrogation of Hall by officers of various police departments and other investigative effort, Cincinnati police appeared at the Bell residence. Bell was taken to police headquarters to answer questions in connection with the Hall investigation and, when the answers to preliminary questions indicated a possible connection with Hall, was given the first of several *Miranda* warnings. Bell was asked to make a recorded statement and instructed, in connection therewith, that he could have his mother present with him when he made any statement, if he so desired. Although Bell declined, the officer nevertheless called his mother to tell her that her son was involved in a homicide, kidnapping and robbery with Hall, and that he was going to be charged with the offenses. An offer was made to transport her to headquarters to be with her son when he made his statement. She declined to come to headquarters.

A statement was then taken from Bell, to eventually be received into evidence. It confirmed most of the factual details related above, but denied any intention of Bell to take part in a homicide. Bell conceded his presence during the kidnapping of Graber, but said he did not know of the presence of the shotgun until Hall got out of the Pontiac to threaten Graber with the weapon. He conceded driving Graber's vehicle to the cemetery and

backing up into the cemetery lane, but insisted that it was Hall who removed Graber from the trunk, and Hall who took him "in the bushes and I heard a shot and I heard this man crying, telling Sam, 'Don't shoot anymore.'" T. p. 340. After the first shot, according to Bell, Hall ran back to the vehicle to get another shell for the shotgun and then returned to the bushes, whereupon Bell heard the second shot. Hall then drove the pair, according to the statement, to Dayton where the incident with the service station operator occurred. Bell attributed the active part of these proceedings to Hall, but admitted following Hall in Graber's Chevrolet while the two vehicles were driven some 20 minutes before Hall was stopped by the highway patrolman.

Additional expert testimony identified a shell casing found at the scene of the homicide as having been fired from the shotgun found on Hall at the time of his arrest in Dayton, and identified a latent fingerprint from the outside window on the driver's side of the Graber vehicle as being that of Bell.

The defense offered only one witness, a Columbus police officer who had interrogated and had taken several statements from Hall. The statements were not, however, offered into evidence, and the case went to the panel on the basis of the evidence presented by the State.

I.

The first three assignments of error challenge the constitutional validity of the Ohio death penalty provisions, and are phrased as follows:

I. Imposition of the punishment of death is in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States, since it constitutes cruel and unusual punishment.

II. The trial court erred in overruling the "Motion for an Order Declaring the Death Penalty Unconstitutional, Dismissing the Specification of Aggravating Circumstances from the Indictment and Sentencing Defendant to Life Imprisonment for His Conviction of Aggravated Murder."

III. The death penalty to which appellant was sentenced offends contemporary standards of decency and constitutes cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the Constitution of the United States.

The first two of these concededly raise questions which are for all practical purposes identical, were therefore argued together, and will be similarly treated here. Appellant urges, under these assignments, that the Ohio death penalty provisions failed to cure the infirmities found by at least three of the Justices constituting the majority of the United States Supreme Court in *Furman v. Georgia*, 408 U.S. 238 (1972) to fatally infect similar legislation and that the Ohio statutory scheme for the punishment of murder contained in R. C. 2929.02 et seq., enacted effective January 1, 1974, failed to eliminate those elements of arbitrary, rare, and discriminatory application which call down the prohibitions of the Eighth and Fourteenth Amendments. Appellant points, among other things, to the continuing presence of such variable elements as grand jury discretion to indict for a capital or non-capital version of the same offense, prosecutor discretion in bringing matters to the grand jury and in plea-bargaining proceedings thereafter, discretion in the Juvenile Division in whether it elects to retain or abjure jurisdiction over a juvenile offender, judicial discretion in finding the presence or absence of aggravating circumstances and/or mitigating circumstances under R. C. 2929.04(A) and (B), and, finally, discretion in the exercise of executive clemency.

The third assignment of error argues the *per se* invalidity of the death penalty under the Eighth and Fourteenth Amendments, urging us to adopt the view that "contemporary knowledge and standards of decency" have demonstrated the "inutility" of the measure as a detriment to crime, and have manifested a more sophisticated approach to the retributive aspects of punishment, as well as a greater knowledge of the possibilities of rehabilitation. These and other factors, argues the appellant, have led to a growing reluctance to resort

to this last enormous and irreversible step, a reluctance which, given the progressive non-static nature of the concept of "cruel and unusual punishment," has finally succeeded in the last half of this century in bringing that mode of punishment within the prohibition of the Amendment.

This argument, while not lacking in legal or humanitarian interest, fails on several grounds, it seems to us. First, it is difficult indeed to derive comfort from the Eighth Amendment as the source of an implied constitutional prohibition of the death penalty, when both the Fifth and Fourteenth Amendments *expressly* contemplate and forgive its use when accompanied by due process of law:

No person shall be held to answer for a *capital*, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person . . . be deprived of life . . . without due process of law. . . .

. . . nor shall any State *deprive any person of life* . . . without due process of law. . . .

To similar effect, see Sections 9 and 10, Article I of the Ohio Constitution.

Secondly, we are unable to derive any dispositive or even persuasive support for this argument from the final arbiters of all such arguably problematical constitutional language, the United States Supreme Court. In the *Furman* case, only two of the nine Justices stated unequivocal support for the proposition here advanced by appellant; the balance of the Justices either supported the constitutionality of the death penalty legislation in question, or found it lacking in detail but not necessarily in principle. Historically, of course, the appropriate use of the death penalty has judicial approbation. As Mr. Justice Douglas remarked in *Furman*:

It has been assumed in our decisions that punishment by death is not cruel, unless the manner of execution can be said to be inhuman and barbarous. *In re Kemmler*, 136 U.S. 436, 447. 408 U.S. at 241.

See also *Wilkerson v. Utah*, 99 U.S. 130, (1878); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947).

In sum, the arguments (and examples) offered by appellant to sustain his first three assignments of error are indistinguishable from those made to us and rejected by us in the recently decided cases of *State v. Reaves*, No. C-75022 (1st Dist., January 26, 1976) and *State v. Woods*, No. C-75047 (1st Dist., January 26, 1976), and require overruling on authority thereof. We note, in passing, the similar result reached by the Court of Appeals for Franklin County, Ohio, in *State v. Harris*, No. 74AP-580, decided June 10, 1975, and *State v. Royster, aka Shaw*, No. 75AP-195, decided August 26, 1975, both unreported, and cite with approval the language of Judge Whiteside in his concurring opinion in the *Harris* case:

Regardless of one's personal views as to whether the death penalty should be used as punishment for crime, the only conclusion consistent with the Constitution itself is that the death penalty is not *per se* unconstitutional, and that the Legislative has the power to provide for the imposition of the death penalty so long as the means of imposition, the manner of determining when it is to be imposed, and the offenses for which it is imposed are neither discriminatory nor constitute cruel and unusual punishment. The mandatory Ohio death penalty, limited in its application to only the most serious types of aggravated murder, and predicated upon detailed factual determinations both as to guilt and mitigating circumstances, meets the constitutional test so as to neither be discriminatory nor constitute cruel and unusual punishment.

The first three assignments of error are overruled.

II.

The appellant's fourth assignment of error is phrased as follows:

IV. Appellant was unconstitutionally coerced into waiving his right to trial by jury by the provisions of §§ 2929.03 and .04, R. C.

The argument here proceeds from the factual circumstances providing for the separation, under the Ohio statutes, of the trial to determine *guilt* pursuant to R. C. 2903.01 and 2929.03, from the trial to determine the *penalty* pursuant to R. C. 2929.03 and .04. The determination of guilt of both the offense and the specification of aggravating circumstances is by verdict of a jury unless waived in writing by the defendant, in which event it is by verdict of a three-judge panel. If a jury is not waived, the determination of penalty is made by the trial judge who presided over the jury trial. If, however, a jury is waived, the penalty is determined by the three judge panel which determined his guilt, under the following procedure:

... if the court finds, or if the panel of three judges *unanimously* finds that none of the mitigating circumstances listed in division (B) of Section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender. (R. C. 2929.03 (E) (Emphasis added)).

Thus, if the defendant succeeds in convincing only one of the three judges on the panel that one or more of the mitigating circumstances listed in R. C. 2929.04 (B) has been established by a preponderance of the evidence, the defendant will escape a sentence of death, as opposed to the argued greater difficulty in so convincing a single sentencing judge. This circumstance, argues the appellant, impels him to select trial by panel rather than trial by jury; the dread of a death sentence is so overwhelming in its compulsion, argues appellant, that it carries all other considerations before it, including what would otherwise constitute a clearly favorable and generally dispositive consideration, viz., the necessity of determining guilt beyond a reasonable doubt by the unanimous verdict of twelve jurors.

Clearly, the creation of a statutory scheme which deliberately, or effectively, even where unintended, dis-

couraged or chilled to any substantial degree the undoubted right of a citizen of this State or of the United States to trial by jury of a criminal offense of the instant magnitude, could not constitutionally be tolerated. In *United States v. Jackson*, 390 U.S. 570 (1968) relied upon by appellant, the United States Supreme Court had before it a federal statute (18 U.S.C. § 1201(A)) which it determined to have precisely such discouraging effect. There, however, the statute providing punishment for conviction of kidnapping made the death penalty possible where trial was by jury, but unavailable where trial was by the court.¹ As was appropriately pointed out by Mr. Justice Stewart, speaking for the Court:

One fact at least is obvious from the face of the statute itself . . . the defendant's assertion of the right to jury trial may cost him his life, for the federal statute authorizes the jury—and only the jury—to return a verdict of death. 390 U.S. at 572.

His waiver of trial by jury, on the other hand, and without more, spared his life. No such dramatic and compelling dichotomy is present in the statutes under review. Death is possible under either alternative, and it may be avoided under both alternatives under the Ohio statutes. Unlike *Jackson*, it is only in the arguably greater *possibility* of avoidance of death growing out of the requirement of unanimity within the panel, and not to its absolute avoidance, that appellant may find any comfort in R. C. 2929.03 (E). Presumably, and paradoxically, appellant would find no constitutional flaw if the statute required the three judge panel to unanimously find the *presence* of a mitigating factor before it could avoid imposing death; but it may reasonably be doubted that this logic would in truth commend itself to the defendant anymore than it did to the General Assembly.

We do not, for these reasons, find *Jackson* to be controlling or persuasive authority for the question at issue. However, we do not wish to be understood as holding that a penalty or other statute which strongly inclined rather than actually coerced a defendant into waiving his right

to a jury trial, would escape the most searching scrutiny as to constitutional rectitude. There are obviously more ways of inducing conduct than bludgeoning someone over the head; statutes may be subtly as well as patently offensive. Were we, therefore, able to conclude from our reading of the statutes in question, or from our experience in dealing with them, that they were so designed, or that they so worked in practice, as to persuasively incline or induce a defendant toward a waiver of the constitutional right to trial by jury that he would otherwise be completely free to enjoy, we could follow appellant's argument with greater ease. Such does not appear to be the case here.

First, since our attention is focused by appellant's argument upon the greater possibility of convincing one out of three judges of the existence of mitigating factors than one judge alone, it seems entirely appropriate to note that there is also a greater possibility of convincing one or more out of twelve jurors of the absence of evidence of guilt beyond a reasonable doubt, than so convincing one out of three judges of the same fact. If the first factor inclines against a jury trial, the latter inclines toward it. The balance struck by these competing considerations is one for the judgment of competent trial counsel; we find no unfair tilt toward the latter which would require us to determine that the statutes unconstitutionally chill the right to trial by jury.

Second, we are reinforced in our above analysis by actual experience with the statutes since they became effective January 1, 1974. Thus, since January 1, 1974, there have been a total of 11 indictments for aggravated murder with specifications of aggravating circumstances in Hamilton County. Of this total, 7 were set for trial by jury, and only 4 of the 11 proceeded to trial before a three judge panel pursuant to waiver of jury trial. This scarcely suggests the existence of any substantial coercion or statutory tilt toward inducing jury waivers; to the contrary, it suggests that the balance referred to, *supra*, is still judged to lie on the side of twelve jurors determining the issue of guilt. The fourth assignment of error is overruled.

III.

The fifth assignment of error challenges the overruling of appellant's motion to suppress his inculpatory statement and its subsequent admission into evidence. The issue raised here is not as to the timing or adequacy of the *Miranda* warnings to Bell, since they were given early, frequently, and correctly, but rather derive from what is conceived to be Bell's special status as a minor:

Appellant challenges these rulings on the ground that a minor has the constitutional right to have the warnings mandated by *Miranda v. Arizona*, 384 U.S. 436, given to his parents as well as to himself before a statement could be taken and used against him, that he had a right to consult with parents and counsel before having to decide whether to waive his *Miranda* rights, and that he had a right to be told, and for his parents to be told, that the possibility existed that the statement might be used in an effort to kill him in the electric chair. In the absence of such warnings made to such persons, and their intelligent and knowing waiver by all such parties, his statement is involuntary and inadmissible. Appellant's brief at 32.

It will be recalled that the interrogating officer who took the statement from Bell testified that he first informed him that he could have his mother present while he made his statement (T. p. 73), that he called the mother and informed her that her son was being held for involvement in a homicide, robbery, and kidnapping (T. p. 73, 74, 107), and further asked her if she would like to be present when he gave the statement. The mother declined the offer of transportation to headquarters, declined the opportunity to be present at the interrogation, and Bell himself again declined to have his mother present when he was informed of this conversation. T. p. 73. After satisfying himself that appellant could read, and had in fact read the card waiving his *Miranda* rights, and that he understood the written and verbal recital of his constitutional rights and had no questions

with respect thereto, the interrogating officer took the statement.

We conclude from our review of the record that of the multiple events appellant would attach as conditions precedent to the receipt of incriminating statements from minors—and without commenting or ruling on the propriety or necessity thereof—only two may be said to have been absent in the instant case: no *Miranda* warnings were given to the mother; and no one told her that her son stood in possible jeopardy of the death penalty.³

Appellant concedes that neither proposition has support in Ohio authorities, and has cited to us no case from any jurisdiction lending support to the latter proposition, which we find to be without merit. Whatever duty the officer had to communicate with Bell's mother, he concededly did so before taking Bell's statement and told her that her son was being held in connection with a homicide, an armed robbery and a kidnapping. This was the sum of the officer's knowledge at that point and was fairly communicated to the mother, who nevertheless declined personal involvement in the interrogation. Any further advice by the officer as to a possible death penalty would have been the purest speculation on his part, since Bell did not actually stand in jeopardy thereof until indictment by the Grand Jury on a charge of aggravated murder with a specification of an aggravating circumstance. Moreover, we are given no reason to assume that a mother who is unmoved by the litany of heinous charges against her son, as related to her by the officer, will be moved by a recital of possible penalties, even the ultimate penalty.

We are left then with the question of whether *Miranda v. Arizona*, 384 U.S. 436 (1966) and its progeny dictate that the *parents* of a minor shall be given a reading of constitutional rights along with their child and whether, by extension, both are then required to intelligently and voluntarily waive those rights as a condition to the constitutional competence of inculpatory statements from the minor. We find nothing in *Miranda* which could dictate that result, although it may be conceded that

when a minor is sought to be interrogated, the question of whether he knowingly and willingly waives constitutional rights cannot always be decided by the same criteria applied to mature adults. Cf. *Haley v. Ohio*, 332 U.S. 596 (1948); *In re Gault*, 387 U.S. 1 (1967). Thus, we have no quarrel with the language of the United States District Court in *United States ex rel. B. v. Shelly*, 305 F. Supp. 55 (E.D.N.Y. 1969), relied upon by appellant:

Maturity is obviously a factor in assessing understanding, whether a confession . . . or *Miranda* rights are involved. . . . While *In Re Gault*, 387 U.S. 1 (1967) . . . has not made a relinquishment of constitutional rights by a juvenile in the absence of parents or adult friends impossible, it teaches us to be cautious in finding a meaningful waiver by a lone child. *Id.* at 58.

Nor would we question the wisdom of Judge Weinstein's further comment in *Shelly* that:

Where a child is involved, a period to compose himself and to obtain the assistance of a mature adviser must be granted if there is to be any assurance that he knowingly waived vital constitutional rights. . . . *Id.* at 59-60.

However, we can find nothing in the instant record which would violate any of these precepts. Bell was, in fact, afforded the opportunity to consult with a lawyer or with his mother, and did, in fact, have a period to compose himself while the officer consulted with his mother. There is nothing in the record of this case bearing any remote resemblance to the assault by officialdom on a "frightened and tired" child that worked the impermissible conduct in *Shelly*. Cf. *State v. White*, 494 S.W. 2d 687 (Mo. App. 1973). Indeed, we are impressed with the meticulous care with which the police approached the rights of Bell, and which surrounded the taking of the statement, and are unable to conclude that the statement was given in other than a willing and knowing fashion by a subject who, though a minor, was both reasonably intelligent and

knowledgeable, and who thoroughly understood and voluntarily and intelligently waived his constitutional rights, including any right to the presence of a mature advisor.

To the extent that *Lewis v. State*, 288 N. E. 2d 138, 142 (Ind. App. 1972) seems to hold (in addition to the criteria outlined above and found present here) that "a juvenile's statement or confession cannot be used against him at a subsequent trial or hearing unless both he and his parents or guardian were informed of his rights to an attorney, and to remain silent," we decline to follow such rule. We also note that in the *Lewis* case, unlike our own, the juvenile's mother was not contacted until after the confession was taken (although that factor would not seem to affect the broadly stated Indiana rule as quoted above). We hold, therefore, that where the State has satisfied its undoubted burden of proving that an inculpatory statement by a minor was voluntarily made pursuant to an intelligent and willing waiver of constitutional rights concerning which he was fully advised, under circumstances demonstrating due regard for the fact that the tender years of the accused require an even more scrupulous attention to the foregoing issues of voluntariness and understanding than in the case of an adult, the overruling of a motion to suppress such statement and its subsequent introduction into evidence was not error simply because the police neglected or declined to charge the mother, or other mature advisor, with the accused's *Miranda* rights.

Appellant's fifth assignment of error is overruled.

IV.

Appellant's sixth assignment of error asserts that the finding of guilt was contrary to law and to the manifest weight of the evidence, and is predicated on the argued absence of evidence that Bell participated in the actual killing of Graber, or in the planning of it. From this, appellant argues that Bell's connection with the crime of homicide was, at best, as an aider and abettor of Hall's crime, and that absent evidence that Bell advised, hired, incited, commanded, counselled, and intended the murder, he may not be convicted therefor. We disagree.

First, we do not agree that there was no credible evidence from which the court could have concluded that Bell participated in the killing. It must be conceded that Bell was intimately involved in the kidnapping and armed robbery; his own statement confirms it. Further, the evidence of Bell's own statement shows that he drove the car into the deserted cemetery and that he asked his companion: "What was we going to do now?" T. p. 340. Further, against Bell's statement that he remained in the car while his companion Hall released the victim from the trunk, took him into the woods, shot him the first time, returned to the car for another shell, reloaded the gun and then returned to shoot the pleading Graber yet a second time, we have the evidence of the witness, Pierce, who distinctly heard *two* car doors slam before the shots, and *two* car doors open after the shots. Moreover, the court was not required to believe that Graber lay supinely with his hands behind his head while his assailant left him alone to return to the car to reload his gun. Evidence of bruises about the body of Graber, the comment of Bell to Hall, the physical circumstances surrounding the slaying, and the testimony of Pierce, all would have justified the trier of fact in disregarding Bell's version of the killing, and in concluding that Bell either committed or, actively assisted Hall in murdering the victim.

Additionally, even if Bell's version of the slaying had been accepted by the court, i.e., that he remained in the car while Hall murdered the victim of their joint kidnapping and armed robbery, we do not understand the law of this State to dictate Bell's acquittal of the charge of aggravated murder. One may aid and abet the commission of a crime without being physically present when it is committed. *Browning v. State*, 21 Ohio L. Abs. 218 (1935); 15 O Jur 2d CRIMINAL LAW § 52. There is abundant credible evidence, already reviewed herein, to have permitted the triers of fact to conclude that Bell well knew the probable outcome of the encounter in the cemetery woods between his armed companion and the victim. Had simple robbery or ransom been the principal motive, the circumstances of the trio's presence in the cemetery would have been without purpose and

the slaying utterly pointless; these facts could not have escaped Bell's attention. Yet—crediting his own story—he participated in the abduction, drove the car to the scene of the murder, sat by awaiting what he must have known would be a killing, and assisted in the escape. That evidence alone is sufficient to sustain the court's finding of guilt, for clearly, under the applicable statute, one who aids and abets another in committing an offense is guilty of the crime of complicity and may be prosecuted and punished as if he were the principal offender. R. C. 2923.03(A)(2). It is not challenged that the charge may be stated in terms of the complicity statute, or in terms of the principal offense, as here. R. C. 2923.03(F). We hold that the court did not err in determining Bell's guilt, either as a principal in the murder, or as an aider and abettor in the slaying; the evidence is sufficient to sustain either theory. Appellant's sixth assignment of error is overruled.

V.

The seventh assignment of error asks us to find prejudicial error in the refusal of the trial court to strike testimony of certain witnesses for the State whose intended presence (and/or criminal records) were not earlier made known to appellant pursuant to requests for discovery. We find this assignment of error totally without merit. In most of the instances complained of, the State was either not in possession of the information in advance of trial, or had orally transmitted it to appellant's counsel as it became available during the course of the proceedings. In each instance, the trial court made careful inquiry of possible prejudice to the appellant, and concluded that none existed. We agree. The assignment of error is overruled.

VI.

Next, appellant asserts that the finding of the panel that appellant had not met his burden of proof during the "penalty trial" as to the presence of one or more mitigating factors was contrary to the manifest weight of the evidence and contrary to law. The thrust of appel-

lant's argument here is addressed to the third mitigating circumstance contained in R. C. 2929.04(B)(3), to wit:

The offense was primarily the product of offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

Appellant concedes that there is no suggestion of psychosis to be found in the record, but relies on the argued presence of "mental deficiency," per se. Hereunder, he is faced with the unanimous opinion of the three psychiatrists who examined him after the determination of guilt, and in connection with the penalty proceedings, that he was neither psychotic nor mentally deficient, nor that the offense was the product of either of these conditions. To the contrary, Bell was found to be "very sharp," to have an estimated I.Q. of 110-120, which would be above average, to have played chess while in jail with sufficient skill to rank as the first or second-best player there. He was, however, found to be "easily led" and "there was strong motivation to follow along with Mr. Hall." T. p. 542.

The findings of the psychiatrists after trial varied somewhat from their earlier conclusions, when they had determined Bell to be competent to stand trial. At that time, his I.Q. was determined to be about 90, he appeared subdued and "not . . . capable of much remorse." Although found to be fully in contact with reality and not suffering from "mental defect or mental illness," he was not "able to fully appreciate the gravity of the situation that he was in—the seriousness of the overall situation." He was probably less "mature" than the average 16 year old, but fully capable of understanding the trial process and of assisting in his defense. T. p. 11-12.

This apparent lacunae, however, is filled by further examination of this record. The difference between the two findings was attributed by the psychiatrists to the improvement in living conditions brought about by being in jail over Bell's previous unconfined experience, and particularly in the absence of hallucinogens (mescaline):

BY MR. MECHLEY:

Q. Just briefly, doctor. I think you probably already answered it, but I notice some distinctions between your first report on the 30 and your subsequent report on the 23, and I believe you said that this may have been the result of the fact that he was still under the influence of drugs on the 30, or perhaps coming out of that.

A. No. I didn't mean to imply that, but I think, being in prison for this period of time and being away from drugs and being regular in his living situation, he seemed a lot clearer, a lot more tuned-in; perhaps the focus of the second examination was a little different, too.

Q. So that it is a fact that, assuming one had been on drugs, assuming one had been drugged during that particular time, that the longer one could keep them off drugs, assuming a good diet and assuming a standard, ritual routine, assuming sometime later, 60 days, 80 days, 100 days, one would get a better report, a better idea of how they are handling themselves at that time?

A. Should, yes. T. p. 543-44.

The sum of the evidence and testimony of the psychiatrists, psychologists, probation department, school authorities, and others thus fails to sustain appellant's position. The picture one derives is unpleasant but not unfamiliar—an unsatisfactory home, absence of familial or other supervision, involvement with drugs, inability to cope with school demands, and so on. While appellant's history is one from which the social psychologist may arguably find a degree of exculpation, it nowhere rises to the level of proof required to establish an R. C. 2929.04 (B) (3) circumstance. The offense was simply not shown to be the product of mental deficiency, and the panel did not err in so finding, or in finding that appellant did not meet his burden of proof during the penalty trial generally.

Appellant's eighth assignment of error is overruled.

VII.

Next, in his ninth and final assignment of error, raised by leave after submission of briefs and oral arguments, the appellant asserts that the trial court was without jurisdiction to hear the cause by reason of double jeopardy, namely, that Bell had previously been subjected to a hearing in the Juvenile Division on the identical offenses for which he was herein indicted, tried and convicted. Appellant's theory rests on the cases of *Breed v. Jones*, 421 U.S. 519, 95 S. Ct. 1779 (1975) and *Brenson v. Havener*, 403 F. Supp. 221 (N.D. Ohio 1975), wherein juveniles had been adjudicated delinquents before being bound over for trial as adults on identical offenses. These cases, however, are factually inapposite to the cause before us, and the argument is not well taken.

Thus, in the instant matter, the transcript of the docket reveals that while Bell had indeed been the subject of a hearing in the juvenile division, said proceeding was the *non-adjudicatory probable cause* hearing prescribed by R. C. 2151.26,* a procedure designed to protect the juvenile, and a procedure wherein the merits are not reached. Cf. *In re Winship*, 397 U.S. 358, 367 (1970); *State v. Carmichael*, 35 Ohio St. 2d 118, cert. den. 414 U.S. 1161 (1974).

Accordingly, it is plain, and we so hold, that where a juvenile offender is subjected to no more than the statutory probable cause hearing under R. C. 2151.26 before his bind-over to the court of common pleas to be tried as an adult, and where, as here, there is no adjudication of delinquency in consequence of said probable cause determination, jeopardy does not attach and there is no impediment thereafter to the common pleas court's taking of jurisdiction. The assignment of error is overruled.

The judgment is affirmed.

SHANNON, P. J. and WHITESIDE, J., CONCUR.

WHITESIDE, J. OF THE TENTH APPELLATE DISTRICT SITTING BY ASSIGNMENT IN THE FIRST APPELLATE DISTRICT OF OHIO.

1. This statute . . . creates an offense punishable by death "if the . . . jury shall so recommend." The statute sets forth no procedure for imposing the death penalty upon a defendant who waives the right to jury trial or upon one who pleads guilty. 390 U.S. at 571.
2. Bell's birth date was December 12, 1957; he was therefore two months short of 17 when the homicide occurred.
3. An additional "condition" which appellant argues, that the appellant and/or his parents must be advised that the Juvenile Division "had the power to relinquish jurisdiction and order him tried as an adult," we reject as meritless. No authority is cited in support of such proposition, and no reason for its adoption commends itself to us.
4. See Entry of November 4, 1974, *In re Willie Lee Bell*, J. C. 74-08044, Hamilton County Court of Common Pleas, Juvenile Division.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Opinion.

E. ORDER OF THE SUPREME COURT OF THE UNITED STATES

SUPREME COURT OF THE UNITED STATES

No. 76-6513

WILLIE LEE BELL, PETITIONER

v.

OHIO

On PETITION FOR WRIT OF CERTIORARI TO the Supreme Court of the State of Ohio.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to Question 1 presented by the petition.

June 27, 1977

Supreme Court, U. S.
FILED

APR 29 1977

MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1976

NO. 76-6513

WILLIE LEE BELL,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

**~~REPLY~~ BRIEF OF RESPONDENT IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1976

NO. 76-6513

WILLIE LEE BELL,
Petitioner,
vs.
STATE OF OHIO,
Respondent.

**REPLY BRIEF OF RESPONDENT IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

Respondent respectfully submits that it is opposed to the issuance of a writ of certiorari in the within cause for the reason that the Ohio Supreme Court has decided the federal questions at issue in accord with the applicable decisions of this court.

OPINIONS BELOW

The Petition of the petitioners correctly cites the opinions below. (Appendix C)

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

- I. Whether Sections 2929.03 and 2929.04 of the Ohio Revised Code, which provide for the imposition of the death penalty under certain circumstances, are violative of the Eighth Amendment of the United States Constitution.
- II. Whether the voluntary waiver of trial by jury and request to be tried by a three-judge panel in a capital case by a defendant violates the right to jury trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.
- III. Whether a juvenile defendant's statement to the police shall be suppressed from evidence where the totality of circumstances demonstrate that the accused was advised numerous times of his constitutional rights, that he stated that he fully understood those rights, and that he did not wish his parent to be present during the giving of his statement.
- IV. Whether the police are required to inform a juvenile and his parents of all the possibilities that could occur to him with regard to possible disposition of the case during the initial interrogation.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Sections 2903.01, 2929.02, 2929.03, and 2929.04 of the Ohio Revised Code, are set forth in Appendix A herein.

STATEMENT OF THE CASE

Petitioner Bell and one Samuel Hall were jointly indicted by the Grand Jury of Hamilton County, Ohio, on November 22, 1974, for two counts of aggravated murder with specifications, one count of kidnapping and one count of aggravated robbery. Petitioner Bell and Samuel Hall were tried separately, each to a three-judge panel from the Court of Common Pleas for Hamilton County, Ohio.

On January 10, 1975, Petitioner's motion to determine his ability to stand trial was heard by a single trial judge. After hearing the evidence the court found the Petitioner to be competent to stand trial. After that determination had been made the Petitioner voluntarily waived a trial by jury and requested a three-judge panel to hear the case (R 53-58) *.

Four days later on January 14, 1975, Petitioner's motion to suppress the statement Petitioner had given to the police was overruled. That same day the trial on the merits commenced before the three-judge panel.

The evidence revealed that the Petitioner and Samuel Hall kidnapped Julius Graber at gunpoint from the parking garage of his apartment building. Mr. Graber was forced to lie in the trunk of his own vehicle while he was driven first by Samuel Hall and then the Petitioner to an isolated lane which went into Spring Grove Cemetery.

Petitioner backed Graber's car down the lane with the headlights turned off. Once they exited from the car Petitioner asked Samuel Hall, "What are *we* going to do now." They removed Mr. Graber from the trunk and led him into the woods.

* "R" is a reference to the Transcript of Proceedings in the case of *State of Ohio v. Willie Lee Bell*.

Robert Pierce, who lived in an adjacent apartment building, heard Mr. Graber plead, "Don't shoot me. Don't shoot me." Then he heard a shot, a short interval of time passed, and then he heard a second shotgun blast. Mr. Pierce continued to watch the cemetery as Samuel Hall entered the automobile from the passenger's side and moved over to the driver's seat. The car then approached the roadway without any headlights on and turned onto the highway and into the night.

The police were notified immediately. They responded to the scene of the shooting within minutes. Mr. Graber had sustained a shotgun blast to the rear of his head but the officers detected some life signs so the emergency squad was summoned. By the time the emergency squad transported Mr. Graber to Cincinnati General Hospital he had expired.

Later at the morgue the officers discovered that Mr. Graber had attempted to secret valuables such as his ring, money and keys in his pockets and shoes. In the opinion of the coroner the fatal shot to the rear of Mr. Graber's head was fired at contact range with Mr. Graber's hands being clasped behind his head at the time of the shooting.

After the shooting the Petitioner and Samuel Hall drove to Dayton, Ohio, in their victim's automobile. The next morning they commandeered Kenneth Hardin, a gasoline station attendant, into the trunk of his automobile at gunpoint. Fortunately, a state highway patrolman stopped Samuel Hall who was driving Hardin's car, for a faulty muffler. The Petitioner was following in the Graber automobile until he saw the patrolman stop his companion. He then returned to Cincinnati where he abandoned the Graber automobile in a vacant garage a short distance from his residence.

One week after the homicide the police went to the Petitioner's residence to ask him to come with them to the police station to answer some questions concerning Samuel Hall. Once it became apparent that the Petitioner was also involved in the homicide of Julius Graber, the police advised him of his constitutional rights.

The officers told the Petitioner they would like him to make a tape recorded statement and that he had a right to have his mother present with him when he gave the statement if he so desired. The Petitioner stated he did not want his mother to be present. The police then called Petitioner's mother, advised her that her son was involved in a homicide and kidnapping and that he had admitted his involvement. Petitioner's mother informed the police she did not want to come down to the police station and that her son could give the statement.

Prior to giving the recorded statement the Petitioner was given a form to read which contained his constitutional rights. A police officer read the form to the Petitioner and asked if he understood his rights. The Petitioner stated he understood his rights and then he signed the form. At the outset of the tape recording the Petitioner indicated that he had been fully advised of his constitutional rights. A tape recorded statement detailing the Petitioner's involvement was then given.

Expert testimony revealed that the fatal shot was fired from the same shotgun that was recovered from the Hardin vehicle that Samuel Hall was driving at the time of his arrest. Further expert testimony demonstrated that Petitioner's fingerprint was located on the outside window on the driver's side of the Graber vehicle.

Based on the evidence adduced at trial the three-judge panel found the Petitioner guilty of aggravated murder

while committing kidnapping as well as finding him guilty of aggravated robbery and kidnapping.

Pre-sentence and psychiatric examinations were ordered pursuant to the Ohio statutes prior to the imposition of sentence. On February 3, 1975, a mitigation hearing was held before the three-judge panel. After hearing all the evidence the court unanimously found no mitigating circumstances to be present. Accordingly, the Petitioner was sentenced to death.

The conviction and sentence were affirmed by the Court of Appeals for the First Appellate District of Ohio, Hamilton County, on April 12, 1976. The Supreme Court of Ohio affirmed the conviction and sentence on December 22, 1976. Petitioner's motion for rehearing was denied by the Supreme Court of Ohio on January 14, 1977.

ARGUMENT

I.

Whether Sections 2929.03 and 2929.04 of the Ohio Revised Code, which provide for the imposition of the death penalty under certain circumstances, are violative of the Eighth Amendment of the United States Constitution.

The primary issue presented by Petitioner is whether Ohio's statutory scheme, which imposes the death penalty, passes constitutional muster in light of this Court's most recent pronouncements on capital punishment as they relate to the Eighth Amendment. Respondent submits that the Ohio laws conform with constitutional standards as defined by this court and as applied by the Supreme Court of Ohio.

Following the decision in *Furman v. Georgia*, 408 U.S. 238 (1972), the Ohio legislature enacted Section 2929.02, Ohio Revised Code (Appendix A), which prescribes the death penalty or life imprisonment for the crime of aggravated murder. Sections 2929.03 and 2929.04, Ohio Revised Code, (Appendix A) set forth the procedure for determining whether the death sentence is to be imposed. Aggravated murder is limited to purposeful killing as defined by Section 2903.01, Ohio Revised Code (Appendix A).

Those statutes permit the death penalty only where one or more aggravating circumstances is specified in the indictment and proved beyond a reasonable doubt. The aggravating factors include: assassination of the President, Vice-President, Governor, Lieutenant Governor, or a per-

son who has been elected to or is a candidate for any such office; murder for hire; murder to escape accountability for another crime; murder by a prisoner; repeat murder or mass murder; killing a law enforcement officer; and murder in the course of certain felonies.

Under the Ohio statutory scheme the trier of fact may be either a jury or, if waived, a three-judge panel. First the trier of fact is to consider whether the defendant is guilty of the charge, and if found guilty, whether he is also guilty of one or more of the specifications in the indictment.

If the defendant is found guilty of the charge and innocent of the specification, a sentence of life imprisonment is imposed. If the defendant is found guilty of the charge and guilty of one or more of the specifications, a separate hearing is held before the trial judge or three-judge panel to determine whether mitigating circumstances exist which preclude imposition of the death penalty.

A pre-sentence investigation and a psychiatric examination of the defendant are required to be made before the hearing. Copies of these reports are furnished to the prosecutor and to the defendant or his counsel. Other evidence and testimony may be submitted at the mitigation hearing, including any statement, sworn or unsworn by the defendant. The death penalty is to be imposed if the trial judge or the three-judge panel unanimously finds that none of the three mitigating factors have been established to exist by a preponderance of the evidence.

In considering whether one of the mitigating circumstances has been established by a preponderance of the evidence the sentencing authority is to consider the nature and circumstances of the offense and the history, character, and condition of the defendant.

Thus, Ohio's statutes provide for a bifurcated trial, in which the issues of guilt, as to the charge and of certain statutorily defined aggravating circumstances, are determined by the jury or, if waived, by a three-judge panel, and the issues of mitigation and sentence are determined by the trial judge or by the three-judge panel.

The defendant has a direct right of appeal of his conviction and sentence pursuant to Rule 4 (B), Ohio Rules of Appellate Procedure (Appendix B). Appeals by leave are governed by Rule 5, Ohio Rules of Appellate Procedure (Appendix B). In accordance with Rule 12 (A), Ohio Rules of Appellate Procedure (Appendix B), the Court of Appeals shall rule on all assignments of error briefed by the Appellant. If the sentence of death is affirmed by a Court of Appeals, a further appeal as a matter of right may be taken to the Supreme Court of Ohio, as provided by Section 2 (B) (2) (a) (ii), Article IV of the Ohio Constitution (Appendix B).

Ohio's statutory scheme differs somewhat from any of these considered by this Court in its July 2, 1976, decisions, but it is basically similar to the Georgia, Florida, and Texas statutes which this Court found to be constitutional. The Ohio statutory scheme insures that the sentencing authority is apprised of information relevant to the imposition of the death sentence and provided with standards to guide its use of the information. Guided by this information and applicable standards the sentencing authority is directed to give attention to the nature or circumstances of the crime committed and to the character of record of the defendant. Thus, Ohio's statutory scheme provides a framework in which the sentencing authority cannot wantonly or freakishly impose the death sentence.

A.

It is submitted that the mitigating circumstances enumerated in Section 2929.04 (B), Ohio Revised Code pass constitutional muster. These standards, although limited to three, echo the language found in the Model Penal Code, (Section 210.6 (4) (C) (f) (g), and Florida Statutes (Section 921.141 (6) (b) (c) (e) (f)). "While these questions and decisions may be hard, they require no more line-drawing than is commonly required of a fact finder in a lawsuit," *Proffitt v. Florida*, — U.S. —, 96 S. Ct. 2960, 2969 (1976). As the Court pointed out, the requirements of *Furman* are satisfied, "when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty", — U.S. —, 96 S. Ct. at 2969. Clearly, Ohio's statutory scheme satisfies this requirement.

The mitigating circumstances must also be considered as they have been construed by the Supreme Court of Ohio. The Supreme Court of Ohio has repeatedly held that the mitigating circumstances are not to be construed narrowly and that relevant factors, such as prior criminal record and the age of the defendant, are to be considered by the sentencing authority, *State v. Bell*, 48 Ohio St. 2d 270, 280-283 (1976); *State v. Black*, 48 Ohio St. 2d 262, 267-268 (1976); *State v. Woods*, 48 Ohio St. 2d 127, 133-138 (1976); and *State v. Osborne*, 49 Ohio St. 2d 135, 145-147 (1976). Through the state appellate procedure each of the mitigating circumstances in Section 2929.04 (B) has undergone close judicial scrutiny.

The mitigating circumstances in Section 2929.04 (B) channel and guide the discretion of the sentencing authority so as to avoid the arbitrary and capricious imposition of the death penalty.

B.

Petitioners have raised the issue of inadequacy of appellate review for the first time in their writ. It was neither argued nor briefed in the Court of Appeals or the Supreme Court of Ohio. Neither of those courts nor the trial court had an opportunity to rule upon the merits of the issue. Respondent prays that this Court not be the one to first issue an opinion on this question that was not raised by the Petitioner in the State courts, *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969).

It is submitted that defendants facing the death penalty in Ohio have adequate appellate review so as to insure that the penalty is not arbitrarily or capriciously imposed. Defendants have a direct right of appeal to the Court of Appeals and a direct right of appeal to the Supreme Court of Ohio where the lower court of review affirms their death sentence, Rule 4 (B), Ohio Rules of Appellate Procedure and Section 2 (B) (2) (a) (ii), Article IV of the Ohio Constitution. Thus, the Supreme Court of Ohio, a court with statewide jurisdiction, affords a defendant sentenced to death a full judicial review so as to promote the evenhanded, rational and consistent imposition of the death sentences under law. *Jurek v. Texas*, — U.S. —, 96 S. Ct. 2950, 2958 (1976); *State v. Miller*, 49 Ohio St. 2d 198, 204 (1977).

This Court has never mandated a particular form of appellate review in death penalty cases. In *State v. Bayless*, 48 Ohio St. 2d 73, 86 (1976), the Supreme Court of Ohio stated that in all capital cases the aggravating and mitigating circumstances would be independently reviewed in each case to insure that capital sentences are fairly imposed by Ohio's trial judges. As the Supreme Court of Ohio observed in *State v. Osborne*, 49 Ohio St. 2d 135,

146 (1976), "The Ohio statutes require the death sentence to be imposed upon all defendants convicted of aggravated murder coupled with at least one of seven aggravating circumstances, provided that none of the three mitigating factors exists." Accordingly, all similarly situated defendants are sentenced alike and have their sentences reviewed by a court of statewide jurisdiction.

Contrary to Petitioner's assertion, the Supreme Court of Ohio is not precluded from inquiring into whether findings of fact are correct. In *State v. Edwards*, 49 Ohio St. 2d 31, 47 (1976), the Supreme Court of Ohio stated that a determination of whether there is substantial evidence to support the verdict rendered whether it be the verdict on the criminal charge, aggravating circumstance, or mitigating circumstance, would be made in each capital case. This scope of review is consistent with both the review afforded by the courts in Georgia and Florida which this Court has determined to pass constitutional standards.

The fact that the Supreme Court of Ohio has affirmed all but one capital sentence it has reviewed only indicates that the Ohio statutory scheme has narrowed the scope of the statutes which provide for the death penalty, with further provisions to focus on the individual nature of the crime and characteristics of the defendant, so that all those upon whom the death penalty is imposed are truly similarly situated.

Prior to the decision in *Furman v. Georgia*, supra, the Ohio statutory scheme permitted the jury to extend mercy in a capital case. That standardless procedure of Ohio's was upheld by this Court in the case of *McGautha v. California*, 402 U.S. 183 (1971). In an order to comply with the dictates of *Furman v. Georgia*, supra, the present Ohio scheme, which provides standards to channel discretion, was enacted. Yet Petitioner now claims Ohio affords

no discretion now, whereas before the problem was too much discretion. It is submitted Ohio's present statutory scheme does provide the sentencing authority with sufficient standards to channel their discretion so as to avoid arbitrary and capricious imposition of the death penalty.

C.

The record reflects that the trial court painstakingly examined both the Petitioner and his counsel to ascertain whether his waiver of a jury trial was totally voluntary. Petitioner voluntarily, intelligently and knowingly waived a trial by jury and elected to be tried by a three-judge panel. At no time did Petitioner or his counsel assert that his Sixth Amendment right to trial by jury was being "chilled" by Ohio's statutory scheme which provides that a three-judge panel must unanimously find an absence of mitigating circumstances.

Unlike the statute in *United States v. Jackson*, 390 U.S. 570 (1968), the death penalty is possible under the Ohio statute whether the defendant is tried before a jury or a three-judge panel, and it may be avoided under both alternatives.

Petitioner attempts to rest his argument of coercion on a "numbers" game. That is, it is easier to convince one of the three-judge panel a mitigating circumstance has been proven than it is to convince only one judge. Obviously, this approach overlooks the possibility that the one judge the Petitioner may have to convince is the same judge who would have heard the case with a jury. For the sake of argument, it is submitted that it may be even easier for the Petitioner to convince one of the twelve jurors that he was not guilty or that he was not guilty

of an aggravating circumstance. Without unanimity by the jury the result is either a hung jury or a life sentence.

As in any waiver of a constitutional right there are certain considerations which incline toward exercising the right and other considerations which incline toward waiving the right. The balance struck by these competing considerations is for the judgment of the defendant and competent trial counsel. That is what occurred in this case. Petitioner has detailed these considerations, which include the fact that there was no defense of alibi or self-defense, there was a confession which was not suppressed, and there were indications from pre-trial psychiatric reports that an insanity defense would not prevail. It is submitted it was these considerations that were the basis for the jury waiver.

Mr. Justice Harlan observed in *McGautha v. California*, supra, that, "The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow. . . . Although a defendant may have a right even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose", 402 U.S. at 213. The fact that the Petitioner was faced with a difficult judgment as to which course to follow does not make Ohio's statutory scheme unconstitutional.

Furthermore, actual experience in Hamilton County, Ohio, demonstrates that the Ohio statutory scheme does not coerce a defendant into waiving his constitutional rights. Of the fifteen capital cases tried in Hamilton County, Ohio, at the time the Supreme Court of Ohio reviewed Petitioner's appeal ten were tried to juries, four were heard by three-judge panels, and one was disposed of by way of appeal. These figures, which have never been

disputed by Petitioner, suggest the total absence of any substantial coercion or statutory tilt toward inducing jury waivers. To the contrary, the figures suggest that the balance is on the side of twelve jurors determining the issue of guilt.

D.

There is ample evidence in the record that Petitioner affirmatively assisted and acted to complete the shotgun slaying of Julius Graber. Pursuant to Section 2923.03 (A) (2) and (F) of the Ohio Revised Code (Appendix A), one who aids and abets another in committing an offense is guilty of the crime of complicity, and may be prosecuted and punished as if he were the principal offender.

The courts of review in Ohio have consistently found, upon a review of the record, that sufficient evidence was adduced to convict the Petitioner for the crime of aggravated murder with specifications. Petitioner's assertion that the Respondent failed to prove purpose is quixotic at best. The evidence demonstrated that the victim died as a result of a shotgun blast, fired at contact range, to the rear of his head while his hands were clasped behind his head.

Imposition of the death penalty in this case is not disproportionate nor does it offend any known contemporary standard of decency.

E.

Like the issue raised in subsection B above, this issue was never assigned as error before the Ohio courts of review. Where federal questions are raised before this Court for the first time on review of state decisions, it is submitted that this Court should not decide those issues.

At the time the mitigation hearing is conducted a defendant stands convicted of aggravated murder and at least one of the aggravating circumstances which was specified in the indictment. The introduction of mitigating circumstances has traditionally been a defense function. The mitigating circumstances listed in Section 2929.04 (B) are far broader than affirmative defenses which the defense must bear the burden of going forward with evidence in order to excuse or otherwise justify the commission of an offense.

Once the defendant stands convicted of the charge and specification, it should rightfully be his burden to present evidence as to why the punishment should be lessened. To require the defendant to do so does not infringe upon any due process rights., *State v Lockett*, 49 Ohio St. 2d 48, 65-66 (1976).

Placing the burden of proof on the defendant at mitigation is clearly distinguishable from placing a burden of proof on the defendant to prove his innocence. For that reason it is submitted that the Ohio statutory procedure does not run afoul of the Due Process Clause as this Court has interpreted that clause in the cases of *Mullaney v. Wilbur*, 421 U.S. 684 (1975), and *In re Winship*, 397 U.S. 358 (1970). In both those cases the Court stated it was the government's burden to prove guilt beyond a reasonable doubt. Ohio's statutory scheme does not deviate from that command and is consistent with the Court's ruling in *Leland v. Oregon*, 343 U.S. 790 (1952).

F.

Like the issues raised in subsections B and E above, this issue has never been assigned as error before the Ohio courts of review. Where federal questions are raised before this Court for the first time on review of state

decisions it is submitted that this Court should not decide those issues.

Although this Court has pointed out that the jury sentencing in a capital case can perform an important societal function, *Witherspoon v. Illinois*, 351 U.S. 510, 519 n. 15 (1968), it has never suggested that jury sentencing is constitutionally required, *Proffitt v. Florida*, — U.S. —, 96 S. Ct. 2960, 2966 (1976).

Pursuant to the Ohio statutory scheme the trial judge or three-judge panel is the sentencing authority depending on whether or not the defendant waives a trial by jury. It is submitted that this system of judicial sentencing enhances the constitutionality of the Ohio statutory scheme in so far as it should lead to even greater consistency in the imposition of capital punishment due to the experience a trial judge has in sentencing procedures.

Prior to *Furman v. Georgia*, supra, the Supreme Court of Ohio held that there was no constitutional provision prohibiting a three-judge court from determining the degree of guilt and sentence without the intervention of a jury, where a jury trial had been voluntarily waived, *State v. Ferguson*, 175 Ohio St. 390, 396 (1964), *State v. Frohner*, 150 Ohio St. 53 (1948). As was mentioned earlier this Court held that Ohio's pre-*Furman* statutory scheme was constitutional in *McGautha v. California*, supra. It is submitted that the imposition of sentence by a three-judge panel or trial Court under the present statutory scheme is no different constitutionally than allowing a three-judge panel to impose sentence without the intervention of a jury under the previous statutory scheme.

II.

Whether the voluntary waiver of trial by jury and request to be tried by a three-judge panel in a capital case by a defendant violates the right to jury trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

Respondent's argument with respect to this question is set forth above in subsection C of the first question, ante pp. 13-15.

It is to be noted that no motion for severance of the counts in the indictment was ever made by Petitioner at trial. As pointed out earlier, there were several considerations which would explain why Petitioner chose to follow the course he did. There is nothing to suggest that the Ohio statutory scheme forced him to waive a jury.

III.

Whether a juvenile defendant's statement to the police shall be suppressed from evidence where the totality of circumstances demonstrate that the accused was advised numerous times of his constitutional rights, that he stated that he fully understood those rights, and that he did not wish his parent to be present during the giving of his statement.

IV.

Whether the police are required to inform a juvenile and his parents of all the possibilities that could occur to him with regard to possible disposition of the case during the initial interrogation.

For the purposes of argument the presentation of respondent's response will be consolidated since the two questions present interrelated issues.

This Court held in *Miranda v. Arizona*, 384 U.S. 436 (1966), that the prosecution could not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.

When the police asked Petitioner, a juvenile with prior contact with law enforcement, to come to the police station to answer some questions his mother was notified where he was being taken and the purpose for which he was being taken to the police station.

Once the Petitioner arrived at the police station he was asked questions concerning Samuel Hall. Based on other information received by the interrogating officer, concerning Petitioner's involvement in the homicide of Julius Graber, the Petitioner was advised of his *Miranda* rights. Petitioner stated he understood what his rights were.

Before any tape recorded statement was taken the Petitioner was again fully advised of his constitutional rights. A notification of rights form was read to Petitioner. Petitioner was also given the form to read. After reading the form and stating he understood his rights the Petitioner signed the form.

The police also informed the Petitioner that he had the right to have his mother present when he gave the recorded statement if he so desired. The Petitioner stated he did not wish to have his mother present. Nevertheless, Petitioner's mother was notified that her son was involved in a homicide and that he had admitted his involvement. The police asked Petitioner's mother if she would like to be present when her son gave a recorded statement. Her response was to let Petitioner make the statement by himself. The police again asked the Petitioner if he wanted his mother present and he again said he did not.

The question of whether a juvenile intelligently and voluntarily waives his rights cannot always be decided by the same criteria applied to mature adults, see, *Haley v. Ohio*, 332 U.S. 596 (1948); *In re Gault*, 387 U.S. 1 (1967). The Supreme Court of Ohio has held that the test to be applied in determining the voluntariness, and, thus the admissibility of a juvenile's statement is the "totality of circumstances" test, *State v. Stewart*, 176 Ohio St. 156 (1964); *State v. Carder*, 9 Ohio St. 2d 1 (1966). It is submitted that Ohio is in accord with the majority of other states and federal courts that have addressed the issue of statements taken from juveniles, see, *Theriault v. State*, 223 N.W. 2d 850, 854 (Wis. Sup. Ct. 1974).

The Respondent met its burden in proving that the inculpatory statement made by the minor Petitioner was made pursuant to an intelligent and voluntary waiver of his constitutional rights of which he was fully advised.

There is no requirement in *Miranda* that the parents of a juvenile shall be read his constitutional rights along with their child, and that, by extension, both parent and child are required to intelligently waive those rights before the juvenile makes a statement. The right against self-incrimination is a personal right. It can only be invoked

by an individual. Constitutional rights are not to be invoked or waived by committee. They are individual rights.

The fact the State of Indiana has chosen to require the police to inform a juvenile's parents or guardian of his rights to an attorney, and to remain silent is not controlling here. The question here is whether the procedural safeguards in Ohio conform with the demands of the Fifth Amendment and the Court's decision in *Miranda v. Arizona*, supra. Had Petitioner perpetrated this heinous crime in the State of Michigan he would not be facing the death penalty at all.

The police did advise Petitioner's mother that her son was involved in a homicide, kidnapping and aggravated robbery. Her response was to decline the police's offer to transport her to the police station so she could be present when the Petitioner gave a recorded statement. To require the police to further advise the parent that her son may suffer the death penalty with the use by the prosecution of the statement and that he may lose the protection of juvenile court is a proposition that is unsupported by any authority from any jurisdiction.

The officer related to Petitioner's mother all of his knowledge at that point. Any further advice by the officer concerning the death penalty or Juvenile Court would have been pure, and improper, speculation since the Petitioner had not yet given his statement.

CONCLUSION

In summary, it is respectfully submitted that the Court should deny a writ of certiorari in this case. The Supreme Court of Ohio correctly decided the issues with respect to the constitutionality of Ohio's statutory scheme which allows for the imposition of the death penalty. This Court's decisions of July 2, 1976, concerning the death penalty were considered and correctly applied by the Supreme Court of Ohio. Accordingly, Respondent respectfully asks this Court to deny the writ of certiorari in this case.

Respectfully submitted,

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APPENDIX A

CONSTITUTION OF THE UNITED STATES

AMENDMENT VI [1791]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT VIII [1791]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

AMENDMENT XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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OHIO REVISED CODE

E. Complicity. § 2923.03, R.C.

1. Text of § 2923.03, R.C., eff. 1-1-74.

§ 2923.03. (A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:

(1) Solicit or procure another to commit the offense;

(2) Aid or abet another in committing the offense;

(3) Conspire with another to commit the offense in violation of § 2923.01, R.C.;

(4) Cause an innocent or irresponsible person to commit the offense.

(B) It is no defense to a charge under this section that no person with whom the accused was in complicity has been convicted as a principal offender.

(C) No person shall be convicted of complicity under this section unless an offense is actually committed, but a person may be convicted of complicity in an attempt to commit an offense in violation of § 2923.02, R.C.

(D) No person shall be convicted of complicity under this section solely upon the testimony of an accomplice, unsupported by other evidence.

(E) It is an affirmative defense to a charge under this section that, prior to the commission of or attempt to commit the offense, the actor terminated his complicity, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

(F) Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section, or in terms of the principal offense.

§ 2903.01 Aggravated murder

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

§ 2929.02 Penalties for murder

(A) Whoever is convicted of aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.03 and 2929.04 of the Revised Code. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

(B) Whoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life. In addition, the offender may be fined an amount fixed by the court, but not more than fifteen thousand dollars.

(C) The court shall not impose a fine in addition to imprisonment or death for aggravated murder, or in addition to imprisonment for murder, unless the offense was committed with purpose to establish, maintain, or facilitate an activity of, a criminal syndicate as defined in section 2923.04 of the Revised Code, or was committed for hire or for purpose of gain.

(D) The court shall not impose a fine or fines for aggravated murder or murder which, in the aggregate and to the extent not suspended by the court, exceeds the amount which the offender is or will be able to pay by the method and within the time allowed without undue hardship to himself or his dependents, or will prevent him from making reparation for the victim's wrongful death.

§ 2929.03 Imposing sentence for a capital offense

(A) If the indictment or count in the indictment charging aggravated murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which

may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;

(2) By the trial judge, if the offender was tried by jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three

judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.

§ 2929.04 Criteria for imposing death or imprisonment for a capital offense

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

APPENDIX B

APPELLATE RULES

RULE 4. Appeal as of right — when taken

* * *

(B) **Appeals in criminal cases.** In a criminal case the notice of appeal by a defendant shall be filed with the clerk of the trial court within thirty days of the date of the entry of the judgment or order appealed from. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof. If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within thirty days after the entry of an order denying the motion. A motion for a new trial on the ground of newly discovered evidence, made after expiration of the time for filing a motion for new trial on other grounds, will not extend the time for appeal from a judgment of conviction. In an appeal by the prosecution, the notice of appeal shall be filed in the trial court within thirty days of the date of the entry of the judgment or order appealed from. A judgment or order is entered within the meaning of this subdivision when it is filed with the clerk of the trial court for journalization.

RULE 5. Appeals by leave of court in criminal cases

(A) **Motion and notice of appeal.** After the expiration of the thirty day period provided by Rule 4(B) for the

filing of a notice of appeal as of right in criminal cases, an appeal may be taken only by leave of the court to which the appeal is taken. In such event, a motion for leave shall be filed with the court of appeals setting forth the reasons for the failure of the appellant to perfect an appeal as of right and setting forth the errors which the movant claims to have occurred in the proceedings of the trial court. The motion shall be accompanied by affidavits, or by such parts of the record upon which the movant relies, to show the probability that the errors claimed did in fact occur, and by a brief or memorandum of law in support of the movant's claims. Concurrently with the filing of the motion the movant shall file with the clerk of the trial court a notice of appeal in the form prescribed by Rule 3 and file a copy of the notice of appeal in the court of appeals. The movant shall also furnish a copy of his motion and a copy of the notice of appeal to the clerk of the court of appeals who thereupon shall serve the notice of appeal and a copy of the motion for leave to appeal upon the attorney for the prosecution, who may, within thirty days from the filing of the motion, file such affidavits, parts of the record and brief or memorandum of law to refute the claims of the movant.

(B) **Determination of the motion.** Except when required by the court the motion shall be determined by the court of appeals on the documents filed without formal hearing or oral argument.

(C) **Order and procedure following determination.** Upon determination of the motion, the court shall journalize its order and the order shall be filed with the clerk of the court of appeals, who thereupon shall certify a copy of the order and mail or otherwise forward the copy to the clerk of the trial court. In the event that the motion

for leave to appeal is overruled the clerk of the trial court shall collect the costs pertaining to the motion, in both the court of appeals and the trial court, from the movant. In the event that the motion is sustained and leave to appeal is granted the further procedure shall be the same as for appeals as of right in criminal cases, except as otherwise specifically provided in these rules.

RULE 12. Determination and judgment on appeal

(A) **Determination.** In every appeal from a trial court of record to a court of appeals, not dismissed, the court of appeals shall review and affirm, modify, or reverse the judgment or final order of the trial court from which the appeal is taken. The appeal shall be determined on its merits on the assignments of error set forth in the briefs required by Rule 16, on the record on appeal as provided by Rule 9, and, unless waived, on the oral arguments of the parties, or their counsel, as provided by Rule 21. Errors not specifically pointed out in the record and separately argued by brief may be disregarded. All errors assigned and briefed shall be passed upon by the court in writing, stating the reasons for the court's decision.

CONSTITUTION OF THE STATE OF OHIO

Art. IV, § 2

§ 2. Supreme court.

(A) The supreme court shall, until otherwise provided by law, consist of seven judges, who shall be known as the chief justice and justices. In case of the absence or disability of the chief justice, the judge having the period of longest total service upon the court shall be the acting chief justice. If any member of the court shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the chief justice or the acting chief justice may direct any judge of any court of appeals to sit with the judges of the supreme court in the place and stead of the absent judge. A majority of the supreme court shall be necessary to constitute a quorum or to render a judgment.

(B) (1) The supreme court shall have original jurisdiction in the following:

- (a) Quo warranto;
- (b) Mandamus;
- (c) Habeas corpus;
- (d) Prohibition;
- (e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination;

(g) Admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.

(2) The supreme court shall have appellate jurisdiction as follows:

(a) In appeals from the courts of appeals as a matter of right in the following:

- (i) Cases originating in the courts of appeals;
- (ii) Cases in which the death penalty has been affirmed;
- (iii) Cases involving questions arising under the constitution of the United States or of this state.

(b) In appeals from the courts of appeals in cases of felony on leave first obtained.

(c) Such revisory jurisdiction of the proceedings of administrative officers or agencies as may be conferred by law;

(d) In cases of public or great general interest, the supreme court may direct any court of appeals to certify its record to the supreme court, and may review and affirm, modify, or reverse the judgment of the court of appeals;

(e) The supreme court shall review and affirm, modify, or reverse the judgment in any case certified by any court of appeals pursuant to section 3 (B) (4) of this article.

(3) No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court.

(C) The decisions in all cases in the supreme court shall be reported, together with the reasons therefor. (Amended by 132 v HR 42, eff. 5-7-68; 120 v 743)

APPENDIX C

OPINION OF THE SUPREME COURT OF OHIO REPORTED AT 48 OHIO ST.2d 270, 358 NE2d 556

THE STATE OF OHIO, APPELLEE, v. BELL, APPELLANT.

[Cite as State v. Bell (1976), 48 Ohio St. 2d 270.]

Criminal law — Aggravated murder — Imposition of death penalty — Waiver of jury trial — R. C. 2929.03 (C) (1), (2) and (E) — Constitutionality — Mitigation hearing — Relevant factors.

1. A defendant is not coerced or impelled to waive his constitutional right to jury trial by R. C. 2929.03 (C) (1), (2) and (E), under the provisions of which an offender who waives a jury trial need persuade only one member of the three-judge panel at the mitigation hearing to avoid imposition of the death penalty.
2. Relevant factors such as the age of the defendant and prior criminal record are among those to be considered by the trial judge or three-judge panel in determining whether the existence of a mitigating circumstance pursuant to R. C. 2929.04 (B) (2) and (3) was established by a preponderance of the evidence.

(No. 76-499—Decided December 22, 1976.)

APPEAL from the Court of Appeals for Hamilton County.

On October 16, 1974, at about 11:00 p.m., police discovered Julius Graber lying in the woods in Spring Grove Cemetery in Hamilton County critically injured from a shotgun wound to the back of his head. He was pronounced dead on arrival at the hospital.

Approximately one week thereafter, Willie Lee Bell, defendant-appellant, was arrested for the murder of Julius Graber. Samuel Hall, Bell's companion, was arrested the day after Graber's body was discovered. Bell was then a minor of 16 years of age, and Hall was an adult. Following proceedings in the Juvenile Division of the Court of Common Pleas, Bell was bound over to the Hamilton County Grand Jury and was indicted jointly with Hall on two counts of aggravated murder, under R. C. 2903.01, with specifications of aggravated robbery and of kidnapping pursuant to R. C. 2929.04 (A) (7). Bell entered pleas of not guilty and not guilty by reason of insanity.

Bell and Hall were tried separately. The trial court found Bell to be sane and competent to stand trial, overruled a motion to suppress any inculpatory statements, and accepted Bell's waiver of trial by jury and requested to be tried by a three-judge panel.

The record tends to reveal the following series of events. On October 16, 1974, Bell and Hall went to a community center in Cincinnati, following which they went to Hall's home to borrow his brother's Grand Prix Pontiac automobile. In that car, Bell and Hall proceeded to Victory Parkway, where they observed a 1974 blue Chevrolet. When the Chevrolet turned into a parking garage, Hall, driving his brother's car, did the same, and followed it to the second level of the garage. After the Chevrolet was parked, Hall got out of the Pontiac with a 20-gauge "sawed-off" shotgun and accosted the Chevrolet's driver, 64-year-old Julius Graber. Graber was forced into the trunk

of his own vehicle, and Hall drove that car, with Bell following in the Pontiac, and parked it near his home. Bell parked the Pontiac at Hall's home, and then drove Graber's Chevrolet toward Spring Grove Cemetery. After driving past the cemetery, Bell stopped, reversed direction, and then backed the car into a lane that went inside the cemetery premises.

At this point, Robert Pierce, Jr., a resident of an apartment building near the cemetery, had just returned from work and was sitting in the parking lot of the building listening to his car radio. Pierce observed a vehicle stopped in the cemetery with its parking lights on. He heard two car doors close, one after the other, turned his radio down to listen, and then heard a voice plead "Don't shoot me. Don't shoot me." Pierce turned his radio off, and shortly thereafter heard one shot, followed, after an interval, by a second shot. He then saw the interior light of the car go on, and a man enter the parked car on the passenger side and move behind the wheel. Pierce heard two car doors close, saw the interior light go off, and then watched the car leave the cemetery, without any lights. Pierce called the police, around 10:50 p.m., who subsequently discovered Graber.

Hall and Bell drove to Dayton, where they spent the night in the Graber Chevrolet. The following morning, Bell driving, they stopped at a service station to ask directions for finding work. After questioning the attendant, Bell and Hall left, but shortly returned. Hall then thrust a shotgun at the attendant, Kenneth B. Hardin, took the keys to Hardin's automobile, forced him into the trunk of his car, and drove it away from the station. Bell followed in Graber's Chevrolet. The Hardin car, however, was stopped by a State Highway Patrolman, and when Hardin pounded on the trunk lid, he was discovered and

released by the officer. Hall was arrested, and the shotgun was found and removed from the car's interior. Meanwhile, Bell, who was still following, proceeded back to Cincinnati, abandoned the Chevrolet on Beatrice Avenue, and returned to his residence on Preston Avenue.

Approximately one week later, following the interrogation of Hall and other investigative effort, Cincinnati police appeared at the Bell residence. Bell was taken to police headquarters to answer questions in connection with the Hall investigation and was given his *Miranda* warnings. When the answers to preliminary questions indicated a possible connection with Hall, Bell was again given his *Miranda* warnings. Approximately one hour later, Bell was given his *Miranda* warnings a third time on a printed "Notification of Rights" form, whereupon he signed the "Waiver of Rights" portion. Bell was asked to make a recorded statement, and was advised that he could have his mother present. Although Bell indicated that he did not want his mother present, the officer called Bell's mother to tell her that her son was involved in a homicide, a kidnapping and an armed robbery, and that he was going to be charged with the offenses. An offer was made to transport her to headquarters to be with her son when he made his statement, but she declined.

A recorded statement was taken from Bell which was eventually received in evidence. It confirmed most of the above factual details, but denied any intention of Bell to take part in a homicide. Bell conceded his presence during the kidnapping of Graber, but claimed he was not aware of the shotgun until Hall got out of the Pontiac in the parking garage to threaten Graber with it. Bell conceded driving Graber's car to the cemetery and backing into the cemetery lane, but insisted that it was Hall who removed Graber from the trunk, and that it was Hall who

took Graber into the bushes. Bell said he then heard a shot and Graber pleading for his life. After the first shot, according to Bell's recorded statement, Hall ran back to the vehicle to get another shotgun shell and then returned to the bushes, whereupon Bell heard the second shot. Hall then drove Bell to Dayton where the incident with the service station attendant occurred. In his statement, Bell attributed the active part of the incident to Hall, but admitted following Hall in Graber's Chevrolet for some 20 minutes before Hall was stopped by the highway patrolman.

Additional expert testimony identified a shell casing found at the scene of the homicide as having been fired from the shotgun found in the car Hall was driving at the time of his arrest in Dayton, and also identified a latent fingerprint from the outside window on the driver's side of the Graber car as being that of Bell's.

After Graber had been pronounced dead at the hospital, where attendants discovered that he had secreted money and other valuables in his shoes, his body was taken to the morgue. A post-mortem examination revealed that death had resulted from a wound to the rear of the head inflicted by a shotgun shell at near-contact range. Testimony established that the head and hand wounds Graber received were consistent with the theory that the fatal shot was fired while Graber's hands were clasped behind his head.

The defense offered only one witness, a Columbus police officer who had interrogated and taken several statements from Hall. The statements were not, however, offered in evidence at the trial, and the case went to the panel on the basis of the evidence presented by the prosecution.

At the conclusion of trial, the panel unanimously found

Bell guilty of aggravated murder as charged on the second count of the indictment, and guilty of the specification to the second count, that the aggravated murder was committed during a kidnapping. Bell was also found guilty of the third and fourth counts of aggravated robbery and of kidnapping, respectively.

Following pre-sentence and psychiatric examination a mitigation hearing was held pursuant to R. C. 2929.03, *et seq.* The panel found that none of the mitigating circumstances specified in R. C. 2929.04 (B) had been established by a preponderance of the evidence. Bell was sentenced to 7 to 25 years on the kidnapping charge; to 7 to 25 years on the aggravated robbery charge, to run consecutively with the first sentence; and to death by electrocution on the aggravated murder charge.

The Court of Appeals affirmed the judgment of the trial court, and the cause is now before this court as a matter of right.

Mr. Simon L. Leis, Jr., prosecuting attorney, *Mr. Robert Hastings, Jr.*, and *Mr. William P. Whalen, Jr.*, for appellee.

Mr. H. Fred Hoefle and *Mr. Thomas A. Luken*, for appellant.

PAUL W. BROWN, J. Appellant Bell raises ten propositions of law. The first three of these assert that Ohio's statutory scheme for the imposition of the death penalty is unconstitutional. That issue was decided by this court in *State v. Bayless* (1976), 48 Ohio St. 2d 73, and need not be reconsidered here. Those propositions of law are overruled.

Appellant asserts in his fourth proposition of law that he was unconstitutionally coerced into waiving his right to

trial by jury by the provisions of R. C. 2929.03 (C) (1), (2) and (E) which provide that if a defendant is tried by jury and convicted, then the trier of fact at the mitigation hearing is the one trial judge who presided over the jury trial; but, if the defendant is tried by a three-judge panel following a waiver of a jury trial, then the trier of fact at the mitigation hearing is the same three-judge panel.

Appellant contends that this statutory scheme coerces defendants, and coerced him, into waiving their right to trial by jury. Before a three-judge panel can impose the death penalty, it must unanimously find that the defendant has failed to establish the existence of one or more of the mitigating circumstances enumerated in R. C. 2929.04 (B). Thus, if tried before a panel, a defendant need convince only one judge out of three that such mitigation existed. If, however, a defendant elects a jury trial, he must convince the sole trial judge at the penalty proceedings that a mitigating circumstance existed. Appellant asserts that this scheme impels defendants to select trial by panel, rather than by jury, because the dread of the death sentence is an overwhelming consideration.

A statutory scheme which deliberately or unintentionally chills the right to trial by jury cannot constitutionally be tolerated. Appellant relies on *United States v. Jackson* (1968), 390 U. S. 570, in which the United States Supreme Court held that a federal statute had such an impermissible chilling effect because it allowed the death penalty in kidnapping cases where trial was by jury, but did not permit the death penalty where trial was by the court.

However, unlike the statute in *Jackson*, the death penalty is possible under the Ohio statute under both alternatives, and it may be avoided under both alternatives. Thus, we are confronted with only the arguably greater possibil-

ity of the avoidance of the death penalty by the requirement of unanimity within the panel, and not with its absolute avoidance as in *Jackson*.

Although appellant asserts that there is a greater possibility of convincing one of three judges on a panel of a mitigating factor than one judge alone, by the same logic, there is also a greater possibility of convincing one or more of 12 jurors of the absence of evidence of guilt beyond a reasonable doubt than so convincing one of three judges. If the first consideration inclines against a jury trial, then the latter inclines toward one. The balance struck by these competing considerations is for the judgment of the defendant and competent trial counsel.

As noted, this statutory scheme furnishes a choice for defendants. Presumably, if no choice were offered, coercion would not be alleged by appellant. We see nothing unreasonable or coercive in the statute: there are pros and cons with respect to each alternative. If a defendant feels uncomfortable with a jury as the trier of fact at trial and the trial judge as the trier of fact at the mitigation hearing, then he may elect a three-judge panel as the trier of fact for all the proceedings. We see nothing objectionable in providing the defendant with a choice, absent, of course, an allegation of ineffective trial counsel. No such allegation was here made.

Further, the Court of Appeals concluded from statistics in Hamilton County that, in actual practice, this statutory scheme does not coerce or impel a defendant to waive jury trial. We are presented with no contrary evidence. Appellant's fourth proposition of law is overruled.

Appellant asserts in his fifth proposition of law that a statement by a juvenile cannot be used against him at trial unless both he and his parents or guardian were informed of his *Miranda* constitutional rights, and unless

the minor was given the opportunity to consult with his parents, guardian or attorney as to whether he should waive those rights.

Appellant cites Indiana case law and apparently concedes that this proposition has no support in Ohio authorities. We decline his invitation to alter existing Ohio law. We perceive no requirement in *Miranda* that the parents of a minor shall be read his constitutional rights along with their child, and that, by extension, both parent and child are required to intelligently waive those rights before the minor makes a statement. Appellant's mother was given every opportunity to be with her son, and, after declining, her presence cannot be forced by police.

When a minor is sought to be interrogated, the question of whether he intelligently and voluntarily waives his rights cannot always be decided by the same criteria applied to mature adults. See *Haley v. Ohio* (1948), 332 U.S. 596; *In re Gault* (1967), 387 U.S. 1. Such criteria necessarily varies with certain factors as the age, emotional stability, physical condition, and mental capacity of the minor. Appellant was adjudicated competent to stand trial as an adult, and thus is not afforded as much protection as a very young or disabled child who is not as capable of intelligently waiving his rights.

We are impressed with the meticulous care with which the police approached appellant's rights. Appellant was advised of his rights three times, and, the last time, was asked whether he understood them. He indicated that he did, and signed a waiver of those rights. Appellant was informed further by the officer that he could have his mother present while making his statement, but he indicated he did not wish her present. The officer nonetheless phoned appellant's mother and informed her that her son was being held for involvement in a homicide, an armed

robbery and a kidnapping, and asked further if she would like to be present when her son gave a statement. The officer offered her transportation to and from police headquarters, but she declined this offer along with the opportunity to be present at the interrogation. After being informed of this conversation, appellant again declined to have his mother present when he gave his statement.

Upon review of the record, we find that the prosecution satisfied its burden of proving that the inculpatory statement by the minor appellant was made pursuant to an intelligent and voluntary waiver of his constitutional rights of which he was fully advised, giving due regard to the requirement that a minor be given even more scrupulous attention to the issues of voluntariness and understanding than an adult. Appellant's fifth proposition of law is overruled.

In his sixth proposition of law, appellant asserts that a juvenile's statement is involuntary and may not be used against him if both he and his parents or guardian have not been advised that he may suffer the death penalty with the use by the prosecution of the statement, and if he and his parents or guardian have not been advised that he may lose the protection of the Juvenile Court.

We find this proposition without merit. Appellant has cited no authority from any jurisdiction that supports it. The officer related to appellant's mother all of his knowledge at that point: that appellant was being held in connection with a homicide, a kidnapping and an armed robbery. Any further advice by the officer concerning the death penalty or Juvenile Court would have been pure, and perhaps improper, speculation since appellant had not yet given his statement. Accordingly, the sixth proposition of law is overruled.

Appellant argues in his seventh proposition of law that one who participates in an armed robbery and a kidnapping is not guilty of aggravated murder where the other participant takes the victim out his presence and deliberately kills him, absent evidence of the first participant's purpose to kill, or that he aided and abetted the actual slaying with the intent that the victim die.

Clearly there is ample evidence that appellant affirmatively assisted and acted to complete the murder. Appellant's denial could be reasonably disbelieved after considering all relevant circumstances, especially that Hall was arrested the next day with a would-be victim in the trunk and appellant following in another car, presumably attempting to carry out the same scheme of murder.

The foregoing evidence is sufficient to sustain a finding of guilt because, under R. C. 2923.03 (A) (2) and (F), one who aids and abets another in committing an offense is guilty of the crime of complicity, and may be prosecuted and punished as if he were the principal offender.

But, in this capital case, this proposition need not be overruled solely on the above grounds. The panel was not required to accept appellant's version of the murder. As the trier of fact, it was within the province of the panel to determine which was the credible evidence. Thus, the gist of appellant's seventh proposition is that the conviction of aggravated murder was contrary to the manifest weight of the evidence. Upon review of the entire record, we hold that there was ample, credible evidence from which the panel could have concluded that appellant actively participated in the murder. Appellant's own statement confirms his involvement in the kidnapping and the armed robbery, and concedes further that, after he drive into the cemetery, he asked Hall what was going to be done next. The court could reasonably disbelieve, as we do, that Graber lay quietly with his hands behind his head while Hall left him

alone to return to his car to reload his shotgun. Evidence of bruises on Graber's body, appellant's statement to police, the physical circumstances of the slaying, and the testimony of the eyewitness Pierce all would have justified the panel's rejection of appellant's version and its conclusion that Bell either committed, or actively assisted in, the murder. The seventh proposition of law is therefore overruled.

Appellant in his eighth proposition of law contends that where the prosecutor fails to advise the defense counsel of the names, addresses and criminal records of witnesses after proper discovery requests, the trial court should not permit those witnesses to testify over objection, or, alternatively, should grant motions to strike such testimony. This proposition is not well taken. The record shows that in most instances the prosecution did not have such information, but orally communicated the information to defense counsel as it was acquired. The trial court carefully examined the possibility of prejudice to appellant, and concluded that no such prejudice existed. This proposition of law is overruled.

Appellant asserts in his ninth proposition of law that a minor is "mentally deficient" within the meaning of R. C. 2929.04 (B) (3), and therefore cannot be sentenced to death after a conviction of aggravated murder with specifications. The Revised Code does not define "mental deficiency"; therefore, unless usurped by a judicial definition, the term must be accorded its common, everyday meaning, keeping in mind that the statutory language defining mitigating circumstances must be strictly construed against the state and liberally construed in favor of the accused. See R. C. 2901.04 (A).

However, we do not agree that a minor is *per se* "mentally deficient" within the meaning of R. C. 2929.04 (B) (3). Such an intention by the General Assembly could have easily been provided for by clear and simple language.

Upon review of the statute, we do not believe the General Assembly intended that a 17-year-old defendant is conclusively "mentally deficient." The ninth proposition of law is overruled.

In his tenth proposition of law, appellant alternatively argues that even if a minor is not *per se* "mentally deficient," for purposes of R. C. 2929.04 (B) (3), the circumstances of this case establish by a preponderance of the evidence that the offense was a product of his mental deficiency, and that the imposition of the death penalty was error.

In considering this proposition, we will not limit ourselves, as appellant has, to the mitigating circumstances of mental deficiency. R. C. 2929.04 (B) states:

"Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance [*sic*] of the evidence:

"(1) The victim of the offense induced or facilitated it.

"(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

"(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity."

The purpose of mitigation is to recognize that the punishment assigned for a criminal act may, for ethical and humanitarian reasons, be tempered out of consideration for the individual offender and his crime. *State v.*

Woods (1976), 48 Ohio St. 2d 127. The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. *Williams v. New York* (1949), 337 U.S. 241, 247.

We will examine each of the three mitigating circumstances provided for in R. C. 2929.04 (B) to determine if the evidence established that such a mitigating factor existed.

We need not spend much time or effort, though, in discussing R. C. 2929.04 (B) (1) as there was no evidence whatsoever that the victim induced or facilitated the crime.

However, the two remaining mitigating circumstances merit consideration. It has been alleged that the mitigating circumstances under R. C. 2929.04 (B) are unconstitutionally narrow because a number of very important factors, such as the age and criminal record of the defendant, appear to be irrelevant under the statute. We believe, however, that the Ohio statutory scheme can withstand this attack. The Ohio statutes, properly construed, permit the trial judge or panel to consider these factors at the mitigation hearing. Such a statutory construction is evident as R. C. 2929.04 (B) states that "the death penalty * * * is precluded when, considering the nature and circumstances of the offense *and the history, character, and condition of the offender*" (emphasis added), one or more of the mitigating circumstances is established. This conclusion is buttressed by the requirement that these statutory provisions be liberally construed in favor of the accused.

As used in R. C. 2929.04 (B) (2), the terms "duress" and "coercion" are to be construed more broadly than when used as a defense in criminal cases. See *State v. Woods* (1976), 48 Ohio St. 2d 127.

There was evidence in the psychiatric reports that appellant was perhaps easily led by Hall. When combined with appellant's age, it is conceivable that all characteristics could establish the mitigating circumstances defined by R. C. 2929.04 (B) (2). However, we believe the panel was justified and correct in finding that this mitigating circumstance was not established by the evidence. Even if it were believed that appellant was apprehensive of Hall and was "forced" to go along with the crimes, the hard fact remains that appellant could have very easily quit the scheme while following in another car. Further, it must be remembered that appellant and Hall were engaged in the same type of scheme the very next day when Hall was arrested. We agree with the panel that, after considering all relevant factors, the second mitigating circumstance was not established.

The third and final mitigating circumstance in the statute concerns the offender's psychosis or mental deficiency. While rejecting appellant's claim that a minor defendant is *per se* "mentally deficient," we do hold that a defendant's age is a primary factor in determining the existence of a mental deficiency. Senility, as well as minority, may well be relevant, and therefore properly considered, in determining whether the offense was a product of mental deficiency.

The sum of the evidence and testimony of the psychiatrists, psychologists, probation department, school authorities and others fails to sustain appellant's position that he suffered from a mental deficiency. Appellant's situation was unpleasant but not unfamiliar: an unsatisfactory home, absence of family or other supervision, drug involvement, and inability to cope with school demands. Even when considered together with defendant's minority, all the factors do not establish a "mental deficiency" for purposes of R. C. 2929.04 (B) (3). Although appellant's environ-

ment was indeed undesirable, such conditions do not excuse or even mitigate aggravated murder. To hold otherwise would set a dangerous and misleading precedent for future defendants. We therefore agree with the panel and the court below that the aggravated murder was not the product of appellant's psychosis or mental deficiency, and therefore overrule appellant's tenth proposition of law.

Accordingly, the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

O'NEILL, C. J., HERBERT, CORRIGAN, STERN, CELEBREZZE and W. BROWN, JJ., concur.

**OPINION OF THE COURT OF APPEALS,
FIRST APPELLATE DISTRICT,
HAMILTON COUNTY, OHIO,
NOT YET REPORTED.**

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

No. C-75068

STATE OF OHIO,
Plaintiff-Appellee,
v.
WILLIE LEE BELL,
Defendant-Appellant.

OPINION

(Filed April 12, 1976)

**Appeal From The Court of Common Pleas
Hamilton County, Ohio**

Messrs. Simon L. Leis, Jr., Robert R. Hastings, Jr., and William P. Whalen, Jr., 420 Hamilton County Court House, Court and Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellee,

Messrs. Thomas A. Luken, 1003, First National Bank Building, 105 East Fourth Street, Cincinnati, Ohio 45202, and H. Fred Hoefle, 400 Second National Bank Building,

830 Main Street, Cincinnati, Ohio 45202, for Defendant-Appellant.

PALMER, J. At about 11:00 P.M. on the evening of October 16, 1974, Julius Graber was discovered by police lying in Spring Grove Cemetery in Hamilton County, Ohio, critically injured from a shotgun wound at the back of his head. He expired in the ambulance on the way to the hospital. Approximately one week thereafter, the defendant-appellant, Willie Lee Bell, then a minor of 16 years of age, was arrested together with one Samuel Hall, an adult, for the murder of Julius Graber. Following proceedings in the Juvenile Division, not here in issue, Bell was bound over to the Hamilton County Grand Jury and was jointly indicted with Hall on two counts of aggravated murder contrary to R. C. 2093.01, with specifications of aggravated robbery and of kidnapping, and on separate counts of aggravated robbery and kidnapping. Counsel was assigned the indigent Bell, and pleas of not guilty and not guilty by reason of insanity were entered.

In subsequent proceedings, the trial court found Bell to be sane and competent to stand trial, overruled a motion to suppress an inculpatory statement, and accepted Bell's waiver of trial by jury and request to be tried by a three-judge panel. Trial then ensued, separate from that of Hall, at the conclusion of which the court unanimously found Bell guilty of aggravated murder as charged in the second count of the indictment, and guilty of the specification to the second count, viz., that the aggravated murder was committed while Bell was committing kidnapping. He was also found guilty of the third and fourth counts of aggravated robbery and of kidnapping, respectively. Following pre-sentence and psychiatric examinations, a hearing on mitigating circumstances was held by the panel pursuant to R. C. 2929.03 et seq., at the conclusion of which

the panel unanimously found that none of the mitigating circumstances specified in R. C. 2929.04 (B) had been established by a preponderance of the evidence. Sentence, including death by electrocution, was then pronounced and entered.

Appeal was timely filed, and counsel provided for appellant to prosecute this appeal. Nine assignments of error are presented, have been vigorously argued, and will be discussed serially *infra*, following a review of such of the evidence produced during the trial and antecedent proceedings as is necessary to provide a fundament for the disposition of the various questions of law raised thereby.

The record reveals a body of evidence adduced on behalf of the State, resulting from the testimony of some 20 witnesses and including the recorded statement of Bell, which tends to establish the following series of events. Earlier in the evening of October 16th, Bell and Hall had met at a youth center in Cincinnati to thereafter leave for Hall's home, where the latter borrowed his brother's Grand Prix Pontiac. After briefly stopping at a White Castle restaurant, the two proceeded to Victory Parkway, falling in column behind a 1974 blue Chevrolet. When the Chevrolet turned into a parking garage, Hall, driving his brother's car, did the same, to follow the leading vehicle to the second floor of the garage. After the Chevrolet was parked, Hall got out of the Pontiac with a 12 gauge "sawed off" shotgun and accosted the Chevrolet's driver, who proved to be Mr. Graber, the 64 year old director of the Glen Manor Home for the Aged. Graber was forced into the trunk of his own vehicle, and Hall drove their unwilling passenger, with Bell following in the Pontiac, to Dana Avenue, where the Pontiac was then parked. Bell next entered Graber's Chevrolet and began driving it in the direction of Spring Grove Cemetery. At shortly before

11:00 P.M., Bell drove past an entrance to the cemetery, stopped and reversed directions, and backed the Chevrolet up a lane inside the cemetery premises.

At this point, one Robert Pierce, a resident of an apartment building on Groesbeck Avenue, near the cemetery, had just returned from work and was sitting in the parking lot of his building in his automobile listening to the conclusion of a baseball game. Through opened windows, he observed a vehicle stopped in the cemetery with its parking lights on. He then heard two car doors close, one after another, turned his radio down to listen, and heard a voice screaming "Don't shoot me; don't shoot me." He turned his radio off, and shortly thereafter heard one shot, followed after an interval by a second shot. He then saw a man enter the parked car on the passenger side to place himself behind the wheel. He heard two car doors closing, saw the parking lights extinguished, and watched the car proceed, without lights, out of the cemetery and onto Gray Road and away. At about 11:00 P.M. this witness called the police, who shortly thereafter discovered Mr. Graber, with the results heretofore related.

After Graber had been pronounced dead at the hospital, his body was removed to the morgue, where attendants discovered that he had secreted money and other valuables in his shoes. A post-mortem examination revealed that death had resulted from a wound at the rear of the head delivered by a shotgun held at near-contact range. Numerous pellets of #5 shot were removed from the body, and testimony was received that the wounds, to hand and head, were consistent with the fatal shot having been delivered while Graber's hands were clasped behind his head.

Following the fatal incident, Hall and Bell drove to Dayton, Ohio, where they spent the night in the Graber Chevrolet. The next morning, with Bell driving, they

stopped at a service station in Dayton where they made certain inquiries of the attendant, one Kenneth Hardin, about finding work. After conversation, Bell and Hall left, but returned following a short interval. Hall then thrust a shotgun at Hardin, relieved him of the keys to his automobile, forced Hardin into its trunk, and drove it away from the station. Bell followed in Graber's Chevrolet. The Hardin car, however, was stopped by a State Highway Patrolman for a defective muffler, and when Hardin pounded on the trunk lid, he was released by the officer. Hall was arrested and the shotgun removed from the vehicle's front seat. Bell, meanwhile, who still was following in the Graber Chevrolet when Hall was stopped, proceeded back to Cincinnati to abandon the Chevrolet on Beatrice Avenue (near his own residence on Preston Avenue) to which he then returned.

Approximately one week later, following the interrogation of Hall by officers of various police departments and other investigative effort, Cincinnati police appeared at the Bell residence. Bell was taken to police headquarters to answer questions in connection with the Hall investigation and, when the answers to preliminary questions indicated a possible connection with Hall, was given the first of several *Miranda* warnings. Bell was asked to make a recorded statement and instructed, in connection therewith, that he could have his mother present with him when he made any statement, if he so desired. Although Bell declined, the officer nevertheless called his mother to tell her that her son was involved in a homicide, kidnapping and robbery with Hall, and that he was going to be charged with the offenses. An offer was made to transport her to headquarters to be with her son when he made his statement. She declined to come to headquarters.

A statement was then taken from Bell, to eventually be received into evidence. It confirmed most of the factual

details related above, but denied any intention of Ball to take part in a homicide. Bell conceded his presence during the kidnapping of Graber, but said he did not know of the presence of the shotgun until Hall got out of the Pontiac to threaten Graber with the weapon. He conceded driving Graber's vehicle to the cemetery and backing up into the cemetery lane, but insisted that it was Hall who removed Graber from the trunk, and Hall who took him "in the bushes and I heard a shot and I heard this man crying, telling Sam, 'Don't shoot anymore.'" T. p. 340. After the first shot, according to Bell, Hall ran back to the vehicle to get another shell for the shotgun and then returned to the bushes, whereupon Bell heard the second shot. Hall then drove the pair, according to the statement, to Dayton where the incident with the service station operator occurred. Bell attributed the active part of these proceedings to Hall, but admitted following Hall in Graber's Chevrolet while the two vehicles were driven some 20 minutes before Hall was stopped by the highway patrolman.

Additional expert testimony identified a shell casing found at the scene of the homicide as having been fired from the shotgun found on Hall at the time of his arrest in Dayton, and identified a latent fingerprint from the outside window of the driver's side of the Graber vehicle as being that of Bell.

The defense offered only one witness, a Columbus police officer who had interrogated and had taken several statements from Hall. The statements were not, however, offered into evidence, and the case went to the panel on the basis of the evidence presented by the State.

I.

The first three assignments of error challenge the constitutional validity of the Ohio death penalty provisions, and are phrased as follows:

I. Imposition of the punishment of death is in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States, since it constitutes cruel and unusual punishment.

II. The trial court erred in overruling the "Motion for an Order Declaring the Death Penalty Unconstitutional, Dismissing the Specification of Aggravating Circumstances from the Indictment and Sentencing Defendant to Life Imprisonment for His Conviction of Aggravated Murder."

III. The death penalty to which appellant was sentenced offends contemporary standards of decency and constitutes cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the Constitution of the United States.

The first two of these concededly raise questions which are for all practical purposes identical, were therefore argued together, and will be similarly treated here. Appellant urges, under these assignments, that the Ohio death penalty provisions failed to cure the infirmities found by at least three of the Justices constituting the majority of the United States Supreme Court in *Furman v. Georgia*, 408 U.S. 238 (1972) to fatally infect similar legislation and that the Ohio statutory scheme for the punishment of murder contained in R. C. 2929.02 et seq., enacted effective January 1, 1974, failed to eliminate those elements of arbitrary, rare, and discriminatory application which call down the prohibitions of the Eighth and Fourteenth Amendments. Appellant points, among other things, to the continuing presence of such variable elements as grand jury discretion to indict for capital or non-capital version of the same offense, prosecutor discretion in bringing matters to the grand jury and in plea-bargaining proceedings thereafter, discretion in the Juvenile Division in whether it elects to retain or abjure jurisdiction over a juvenile

offender, judicial discretion in finding the presence or absence of aggravating circumstances and/or mitigating circumstances under R. C. 2929.04 (A) and (B), and, finally, discretion in the exercise of executive clemency.

The third assignment of error argues the *per se* invalidity of the death penalty under the Eighth and Fourteenth Amendments, urging us to adopt the view that "contemporary knowledge and standards of decency" have demonstrated the "inutility" of the measure as a detriment to crime, and have manifested a more sophisticated approach to the retributive aspects of punishment, as well as a greater knowledge of the possibilities of rehabilitation. These and other factors, argues the appellant, have led to a growing reluctance to resort to this last enormous and irreversible step, a reluctance which, given the progressive non-static nature of the concept of "cruel and unusual punishment," has finally succeeded in the last half of this century in bringing that mode of punishment within the prohibition of the Amendment.

This argument, while not lacking in legal or humanitarian interest, fails on several grounds, it seems to us. First, it is difficult indeed to derive comfort from the Eighth Amendment as the source of an implied constitutional prohibition of the death penalty, when both the Fifth and Fourteenth Amendments *expressly* contemplate and forgive its use when accompanied by due process of law:

No person shall be held to answer for a *capital*, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person . . . be deprived of life . . . without due process of law. . . .

. . . nor shall any State deprive any person of life . . . without due process of law

To similar effect, see Sections 9 and 10, Article I of the Ohio Constitution.

Secondly, we are unable to derive any dispositive or even persuasive support for this argument from the final arbiters of all such arguably problematical constitutional language, the United States Supreme Court. In the *Furman* case, only two of the nine Justices stated unequivocal support for the proposition here advanced by appellant; the balance of the Justices either supported the constitutionality of the death penalty legislation in question, or found it lacking in detail but not necessarily in principle. Historically, of course, the appropriate use of the death penalty has judicial approbation. As Mr. Justice Douglas remarked in *Furman*:

It has been assumed in our decisions that punishment by death is not cruel, unless the manner of execution can be said to be inhuman and barbarous. *In re Kemmler*, 136 U.S. 436, 447.
408 U.S. at 241.

See also *Wilkerson v. Utah*, 99 U.S. 130, (1878); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947).

In sum, the arguments (and examples) offered by appellant to sustain his first three assignments of error are indistinguishable from those made to us and rejected by us in the recently decided cases of *State v. Reeves*, No. C-75022 (1st Dist., January 26, 1976) and *State v. Woods*, No. C-75047 (1st Dist., January 26, 1976), and require overruling on authority thereof. We note, in passing, the similar result reached by the Court of Appeals for Franklin County, Ohio, in *State v. Harris*, No. 74AP-580, decided June 10, 1975, and *State v. Royster, aka Shaw*, No. 75AP-195, decided August 26, 1975, both unreported, and cite with approval the language of Judge Whiteside in his concurring opinion in the *Harris* case:

Regardless of one's personal views as to whether the death penalty should be used as punishment for crime, the only conclusion consistent with the Constitution itself is that the death penalty is not *per se* unconstitutional, and that the Legislature has the power to provide for the imposition of the death penalty so long as the means of imposition, the manner of determining when it is to be imposed, and the offenses for which it is imposed are neither discriminatory nor constitute cruel and unusual punishment. The mandatory Ohio death penalty, limited in its application to only the most serious types of aggravated murder, and predicated upon detailed factual determinations both as to guilt and mitigating circumstances, meets the constitutional test so as to neither be discriminatory nor constitute cruel and unusual punishment.

The first three assignments of error are overruled.

II.

The appellant's fourth assignment of error is phrased as follows:

IV. Appellant was unconstitutionally coerced into waiving his right to trial by jury by the provisions of §§ 2929.03 and .04, R.C.

The argument here proceeds from the factual circumstance providing for the separation, under the Ohio statutes, of the trial to determine *guilt* pursuant to R. C. 2903.01 and 2929.03, from the trial to determine the *penalty* pursuant to R. C. 2929.03 and .04. The determination of guilt of both the offense and the specification of aggravating circumstance is by verdict of a jury unless waived in writing by the defendant, in which event it is by verdict of a three-judge panel. If a jury is not waived, the determination of penalty is made by the trial judge who presided over the jury trial. If, however, a jury is waived, the

penalty is determined by the three judge panel which determined his guilt, under the following procedure:

... if the court finds, or if the panel of three judges *unanimously* finds that none of the mitigating circumstances listed in division (B) of Section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.

R. C. 2929.03 (E) (Emphasis added).

Thus, if the defendant succeeds in convincing only one of the three judges on the panel that one or more of the mitigating circumstances listed in R. C. 2929.04 (B) has been established by a preponderance of the evidence, the defendant will escape a sentence of death, as opposed to the argued greater difficulty in so convincing a single sentencing judge. This circumstance, argues the appellant, impels him to select trial by panel rather than trial by jury; the dread of a death sentence is so overwhelming in its compulsion, argues appellant, that it carries all other considerations before it, including what would otherwise constitute a clearly favorable and generally dispositive consideration, viz., the necessity of determining guilt beyond a reasonable doubt by the unanimous verdict of twelve jurors.

Clearly, the creation of a statutory scheme which deliberately, or effectively, even where unintended, discourages or chilled to any substantial degree the undoubted right of a citizen of this State or of the United States to trial by jury of a criminal offense of the instant magnitude, could not constitutionally be tolerated. In *United States v. Jackson*, 390 U.S. 570 (1968) relied upon by appellant, the United States Supreme Court had before it a federal statute (18 U.S.C. § 1201(A)) which it determined to have precisely such discouraging effect. There, however,

the statute providing punishment for conviction of kidnapping made the death penalty possible where trial was by jury, but unavailable where trial was by the court.¹ As was appropriately pointed out by Mr. Justice Stewart, speaking for the Court:

One fact at least is obvious from the face of the statute itself . . . the defendant's assertion of the right to jury trial may cost him his life, for the federal statute authorizes the jury — and only the jury — to return a verdict of death.

390 U.S. at 572.

His waiver of trial by jury, on the other hand, and without more, spared his life. No such dramatic and compelling dichotomy is present in the statutes under review. Death is possible under either alternative, and it may be avoided under both alternatives under the Ohio statutes. Unlike *Jackson*, it is only in the arguably greater possibility of avoidance of death growing out of the requirement of unanimity within the panel, and not to its absolute avoidance, that appellant may find any comfort in R. C. 2929.03 (E). Presumably, and paradoxically, appellant would find no constitutional flaw if the statute required the three judge panel to unanimously find the presence of a mitigating factor before it could avoid imposing death; but it may reasonably be doubted that this logic would in truth commend itself to the defendant anymore than it did to the General Assembly.

We do not, for these reasons, find *Jackson* to be controlling or persuasive authority for the question at issue.

¹ This statute . . . creates an offense punishable by death "if the . . . jury shall so recommend." The statute sets forth no procedure for imposing the death penalty upon a defendant who waives the right to jury trial or upon one who pleads guilty.

390 U.S. at 571.

However, we do not wish to be understood as holding that a penalty or other statute which strongly inclined rather than actually coerced a defendant into waiving his right to a jury trial, would escape the most searching scrutiny as to constitutional rectitude. There are obviously more ways of inducing conduct than bludgeoning someone over the head; statutes may be subtly as well as patently offensive. Were we, therefore, able to conclude from our reading of the statutes in question, or from our experience in dealing with them, that they were so designed, or that they so worked in practice, as to persuasively incline or induce a defendant toward a waiver of the constitutional right to trial by jury that he would otherwise be completely free to enjoy, we could follow appellant's argument with greater ease. Such does not appear to be the case here.

First, since our attention is focused by appellant's argument upon the greater possibility of convincing one out of three judges of the existence of mitigating factors than one judge alone, it seems entirely appropriate to note that there is also a greater possibility of convincing one or more out of twelve jurors of the absence of evidence of guilt beyond a reasonable doubt, than so convincing one out of three judges of the same fact. If the first factor inclines against a jury trial, the latter inclines toward it. The balance struck by these competing considerations is one for the judgment of competent trial counsel; we find no unfair tilt toward the latter which would require us to determine that the statutes unconstitutionally chill the right to trial by jury.

Second, we are reinforced in our above analysis by actual experience with the statutes since they became effective January 1, 1974. Thus, since January 1, 1974, there have been a total of 11 indictments for aggravated murder with specifications of aggravating circumstances in Hamilton County. Of this total, 7 were set for trial by jury, and only

4 of the 11 proceeding to trial before a three judge panel pursuant to waiver of jury trial. This scarcely suggests the existence of any substantial coercion or statutory tilt toward inducing jury waivers; to the contrary, it suggests that the balance referred to, supra, is still judged to lie on the side of twelve jurors determining the issue of guilt. The fourth assignment of error is overruled.

III.

The fifth assignment of error challenges the overruling of appellant's motion to suppress his inculpatory statement and its subsequent admission into evidence. The issue raised here is not as to the timing or adequacy of the *Miranda* warnings to Bell, since they were given early, frequently, and correctly, but rather derive from what is conceived to be Bell's special status as a minor:²

Appellant challenges these rulings on the ground that a minor has the constitutional right to have the warnings mandated by *Miranda v. Arizona*, 384 U.S. 436, given to his parents as well as to himself before a statement could be taken and used against him, that he had a right to consult with parents and counsel before having to decide whether to waive his *Miranda* rights, and that he had a right to be told, and for his parents to be told, that the possibility existed that the statement might be used in an effort to kill him in the electric chair. In the absence of such warnings made to such persons, and their intelligent and knowing waiver by all such parties, his statement is involuntary and inadmissible.

Appellant's brief at 32.

² Bell's birth date was December 12, 1957; he was therefore two months short of 17 when the homicide occurred.

It will be recalled that the interrogating officer who took the statement from Bell testified that he first informed him that he could have his mother present while he made his statement (T. p. 73), that he called the mother and informed her that her son was being held for involvement in a homicide, robbery, and kidnapping (T. p. 73, 74, 107), and further asked her if she would like to be present when he gave the statement. The mother declined the offer of transportation to headquarters, declined the opportunity to be present at the interrogation, and Bell himself again declined to have his mother present when he was informed of this conversation. T. p. 73. After satisfying himself that appellant could read, and had in fact read the card waiving his *Miranda* rights, and that he understood the written and verbal recital of his constitutional rights and had no questions with respect thereto, the interrogating officer took the statement.

We conclude from our review of the record that of the multiple events appellant would attach as conditions precedent to the receipt of incriminating statements from minors — and without commenting or ruling on the propriety or necessity thereof — only two may be said to have been absent in the instant case: no *Miranda* warnings were given to the mother; and no one told her that her son stood in possible jeopardy of the death penalty.³

Appellant concedes that neither proposition has support in Ohio authorities, and has cited to us no case from any jurisdiction lending support to the later proposition, which we find to be without merit. Whatever duty the

³ An additional "condition" which appellant argues, that the appellant and/or his parents must be advised that the Juvenile Division "had the power to relinquish jurisdiction and order him tried as an adult," we reject as meritless. No authority is cited in support of such proposition, and no reason for its adoption commends itself to us.

officer had to communicate with Bell's mother, he concededly did so before taking Bell's statement and told her that her son was being held in connection with a homicide, an armed robbery and a kidnapping. This was the sum of the officer's knowledge at that point and was fairly communicated to the mother, who nevertheless declined personal involvement in the interrogation. Any further advice by the officer as to a possible death penalty would have been the purest speculation on his part, since Bell did not actually stand in jeopardy thereof until indictment by the Grant Jury on a charge of aggravated murder with a specification of an aggravating circumstance. Moreover, we are given no reason to assume that a mother who is unmoved by the litany of heinous charges against her son, as related to her by the officer, will be moved by a recital of possible penalties, even the ultimate penalty.

We are left then with the question of whether *Miranda v. Arizona*, 384 U.S. 436 (1966) and its progeny dictate that the parents of a minor shall be given a reading of constitutional rights along with their child and whether, by extension, both are then required to intelligently and voluntarily waive those rights as a condition to the constitutional competence of inculpatory statements from the minor. We find nothing in *Miranda* which could dictate that result, although it may be conceded that when a minor is sought to be interrogated, the question of whether he knowingly and willingly waives constitutional rights cannot always be decided by the same criteria applied to mature adults. Cf. *Haley v. Ohio*, 332 U.S. 596 (1948); *In re Gault*, 387 U.S. 1 (1967). Thus, we have no quarrel with the language of the United States District Court in *United States ex rel B. v. Shelly*, 305 F. Supp. 55 (E.D.N.Y. 1969), relied upon by appellant:

Maturity is obviously a factor in assessing understanding, whether a confession . . . or *Miranda* rights are

involved. . . . While *In re Gault*, 387 U.S. 1 (1967) . . . has not made a relinquishment of constitutional rights by a juvenile in the absence of parents or adult friends impossible, it teaches us to be cautious in finding a meaningful waiver by a lone child.

Id. at 58.

Nor would we question the wisdom of Judge Weinstein's further comment in *Shelly* that:

Where a child is involved, a period to compose himself and to obtain the assistance of a mature adviser must be granted if there is to be any assurance that he knowingly waived vital constitutional rights. . . .

Id. at 59-60.

However, we can find nothing in the instant record which would violate any of these precepts. Bell was, in fact, afforded the opportunity to consult with a lawyer or with his mother, and did, in fact, have a period to compose himself while the officer consulted with his mother. There is nothing in the record of this case bearing any remote resemblance to the assault by officialdom on a "frightened and tired" child that worked the impermissible conduct in *Shelly*. Cf. *State v. White*, 494 S.W. 2d 687 (Mo. App. 1973). Indeed, we are impressed with the meticulous care with which the police approached the rights of Bell, and which surrounded the taking of the statement, and are unable to conclude that the statement was given in other than a willing and knowing fashion by a subject who, though a minor, was both reasonably intelligent and knowledgeable, and who thoroughly understood and voluntarily and intelligently waived his constitutional rights, including any right to the presence of a mature advisor.

To the extent that *Lewis v. State*, 288 N. E. 2d 138, 142 (Ind. App. 1972) seems to hold (in addition to the criteria

outlined above and found present here) that "a juvenile's statement or confession cannot be used against him at a subsequent trial or hearing unless *both he and his parents or guardian* were informed of his rights to an attorney, and to remain silent," we decline to follow such rule. We also note that in the *Lewis case*, unlike our own, the juvenile's mother was not contacted until *after* the confession was taken (although that factor would not seem to affect the broadly stated Indiana rule as quoted above). We held, therefore, that where the State has satisfied its undoubted burden of proving that an inculpatory statement by a minor was voluntarily made pursuant to an intelligent and willing waiver of constitutional rights concerning which he was fully advised, under circumstances demonstrating due regard for the fact that the tender years of the accused require an even more scrupulous attention to the foregoing issues of voluntariness and understanding than in the case of an adult, the overruling of a motion to suppress such statement and its subsequent introduction into evidence was not error simply because the police neglected or declined to charge the mother, or other mature advisor, with the accused's *Miranda* rights.

Appellant's fifth assignment of error is overruled.

IV.

Appellant's sixth assignment of error asserts that the finding of guilt was contrary to law and to the manifest weight of the evidence, and is predicated on the argued absence of evidence that Bell participated in the actual killing of Graber, or in the planning of it. From this, appellant argues that Bell's connection with the crime of homicide was, at best, as an aider and abettor of Hall's crime, and that absent evidence that Bell advised, hired,

incited, commanded, counselled, and intended the murder, he may not be convicted therefor. We disagree.

First, we do not agree that there was no credible evidence from which the court could have concluded that Bell participated in the killing. It must be conceded that Bell was intimately involved in the kidnapping and armed robbery; his own statement confirms it. Further, the evidence of Bell's own statement shows that he drove the car into the deserted cemetery and that he asked his companion: "What was we going to do now?" T. p. 340. Further, against Bell's statement that he remained in the car while his companion Hall released the victim from the trunk, took him into the woods, shot him the first time, returned to the car for another shell, reloaded the gun and then returned to shoot the pleading Graber yet a second time, we have the evidence of the witness, Pierce, who distinctly heard *two* car doors slam before the shots, and *two* car doors open *after* the shots. Moreover, the court was not required to believe that Graber lay supinely with his hands behind his head while his assailant left him alone to return to the car to reload his gun. Evidence of bruises about the body of Graber, the comment of Bell to Hall, the physical circumstances surrounding the slaying, and the testimony of Pierce, all would have justified the trier of fact in disregarding Bell's version of the killing, and in concluding that Bell either committed or, actively assisted Hall in murdering the victim.

Additionally, even if Bell's version of the slaying had been accepted by the court, i.e., that he remained in the car while Hall murdered the victim of their joint kidnapping and armed robbery venture, we do not understand the law of this State to dictate Bell's acquittal of the charge of aggravated murder. One may aid and abet the commission of a crime without being physically present

when it is committed. *Browning v. State*, 21 Ohio L. Abs. 218 (1935); 15 O Jur 2d CRIMINAL LAW § 52. There is abundant credible evidence, already reviewed herein, to have permitted the triers of fact to conclude that Bell well knew the probable outcome of the encounter in the cemetery woods between his armed companion and the victim. Had simple robbery or ransom been the principal motive, the circumstances of the trio's presence in the cemetery would have been without purpose and the slaying utterly pointless; these facts could not have escaped Bell's attention. Yet — crediting his own story — he participated in the abduction, drove the car to the scene of the murder, sat by awaiting what he must have known would be a killing, and assisted in the escape. That evidence alone is sufficient to sustain the court's finding of guilt, for clearly, under the applicable statute, one who aids and abets another in committing an offense is guilty of the crime of complicity and may be prosecuted and punished as if he were the principal offender. R. C. 2923.03 (A) (2). It is not challenged that the charge may be stated in terms of the complicity statute, or in terms of the principal offense, as here. R. C. 2923.03 (F). We hold that the court did not err in determining Bell's guilt, either as a principal in the murder, or as an aider and abettor in the slaying; the evidence is sufficient to sustain either theory. Appellant's sixth assignment of error is overruled.

V.

The seventh assignment of error asks us to find prejudicial error in the refusal of the trial court to strike testimony of certain witnesses for the State whose intended presence (and/or criminal records) were not earlier made known to appellant pursuant to requests for discovery.

We find this assignment of error totally without merit. In most of the instances complained of, the State was either not in possession of the information in advance of trial, or had orally transmitted it to appellant's counsel as it became available during the course of the proceedings. In each instance, the trial court made careful inquiry of possible prejudice to the appellant, and concluded that none existed. We agree. The assignment of error is overruled.

VI.

Next, appellant asserts that the finding of the panel that appellant had not met his burden of proof during the "penalty trial" as to the presence of one or more mitigating factors was contrary to the manifest weight of the evidence and contrary to law. The thrust of appellant's argument here is addressed to the third mitigating circumstance contained in R. C. 2929.04 (B) (3), to wit:

The offense was primarily the product of offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

Appellant concedes that there is no suggestion of psychosis to be found in the record, but relies on the argued presence of "mental deficiency," per se. Hereunder, he is faced with the unanimous opinion of the three psychiatrists who examined him after the determination of guilt, and in connection with the penalty proceedings, that he was neither psychotic nor mentally deficient, nor that the offense was the product of either of these conditions. To the contrary, Bell was found to be "very sharp," to have an estimated I.Q. of 110-120, which would be above average, to have played chess while in jail with sufficient skill to rank as the first or second-best player there. He was,

however, found to be "easily led" and "there was strong motivation to follow along with Mr. Hall." T. p. 542.

The findings of the psychiatrists after trial varied somewhat from their earlier conclusions, when they had determined Bell to be competent to stand trial. At that time, his I.Q. was determined to be about 90, he appeared subdued and "not . . . capable of much remorse." Although found to be fully in contact with reality and not suffering from "mental defect or mental illness," he was not "able to fully appreciate the gravity of the situation that he was in — the seriousness of the overall situation." He was probably less "mature" than the average 16 year old, but fully capable of understanding the trial process and of assisting in his defense. T. p. 11-12.

This apparent lucunae, however, is filled by further examination of this record. The difference between the two findings was attributed by the psychiatrists to the improvement in living conditions brought about by being in jail over Bell's previous unconfined experience, and particularly in the absence of hallucinogens (mescaline):

BY MR. MECHLEY:

Q. Just briefly, doctor. I think you probably already answered it, but I notice some distinctions between your first report on the 30 and your subsequent report on the 23, and I believe you said that this may have been the result of the fact that he was still under the influence of drugs on the 30, or perhaps coming out of that.

A. No. I didn't mean to imply that, but I think, being in prison for this period of time and being away from drugs and being regular in his living situation, he seemed a lot clearer, a lot more tuned-in; perhaps the focus of the second examination was a little different, too.

Q. So that it is a fact that, assuming one had been on drugs, assuming one had been drugged during that particular time, that the longer one could keep them off drugs, assuming a good diet and assuming a standard, ritual routine, assuming sometime later, 60 days, 80 days, 100 days, one would get a better report, a better idea of how they are handling themselves at that time?

A. Should, yes.

T. p. 543-44.

The sum of the evidence and testimony of the psychiatrists, psychologists, probation department, school authorities, and others thus fails to sustain appellant's position. The picture one derives is unpleaant but not unfamiliar — an unsatisfactory home, absence of familial or other supervision, involvement with drugs, inability to cope with school demands, and so on. While appellant's history is one from which the social psychologist may arguably find a degree of exculpation, it nowhere rises to the level of proof required to establish an R. C. 2929.04 (B) (3) circumstance. The offense was simply not shown to be the product of mental deficiency, and the panel did not err in so finding, or in finding that appellant did not meet his burden of proof during the penalty trial generally.

Appellant's eighth assignment of error is overruled.

VII.

Next, in his ninth and final assignment of error, raised by leave after submission of briefs and oral arguments, the appellant asserts that the trial court was without jurisdiction to hear the cause by reason of double jeopardy, namely, that Bell had previously been subjected to a hearing in the Juvenile Division on the identical offenses for which he was herein indicted, tried and convicted. Appellant's

theory rests on the cases of *Breed v. Jones*, 421 U.S. 519, 95 S. Ct. 1779 (1975) and *Brenson v. Havener*, 403 F. Supp. 221 (N.D. Ohio 1975), wherein juveniles had been adjudicated delinquents before being bound over for trial as adults on identical offenses. These cases, however, are factually inapposite to the cause before us, and the argument is not well taken.

Thus, in the instant matter, the transcript of the docket reveals that while Bell had indeed been the subject of a hearing in the juvenile division, said proceeding was the non-adjudicatory *probable cause* hearing prescribed by R. C. 2151.26,⁴ a procedure designed to protect the juvenile, and a procedure wherein the merits are not reached. Cf. *In re Winship*, 397 U.S. 358, 367 (1970); *State v. Carmichael*, 35 Ohio St. 2d 118, cert. den. 414 U.S. 1161 (1974).

Accordingly, it is plain, and we so hold, that where a juvenile offender is subjected to no more than the statutory probable cause hearing under R. C. 2151.26 before his bind-over to the court of common pleas to be tried as an adult, and where, as here, there is no adjudication of delinquency in consequence of said probable cause determination, jeopardy does not attach and there is no impediment thereafter to the common pleas court's taking of jurisdiction. The assignment of error is overruled.

The judgment is affirmed.

SHANNON, P. J. and WHITESIDE, J., CONCUR.

WHITESIDE, J. OF THE TENTH APPELLATE DISTRICT SITTING BY ASSIGNMENT IN THE FIRST APPELLATE DISTRICT OF OHIO.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Opinion.

⁴ See Entry of November 4, 1974, *In re Willie Lee Bell*, J. C. 74-08044, Hamilton County Court of Common Pleas, Juvenile Division.

20
In The
SUPREME COURT OF THE UNITED STATES

October Term, 1976

WILLIE LEE BELL,

Petitioner

-vs-

THE STATE OF OHIO,

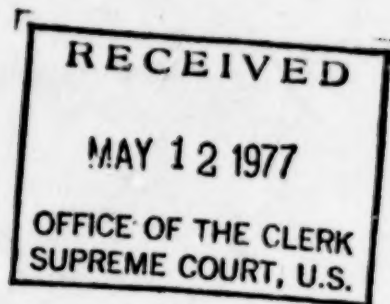
Respondent

§

§

§

§



NO. 76-6513

Peter's Reply Brief

RESPONSE TO REPLY BRIEF OF RE-
SPONDENT IN OPPOSITION TO PETI-
TION FOR WRIT OF CERTIORARI

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In the Reply Brief in Opposition, the Respondent asserts that the issue of inadequate appellate review was "neither argued nor briefed in the Court of Appeals or the Supreme Court of Ohio" Reply, p. 11.

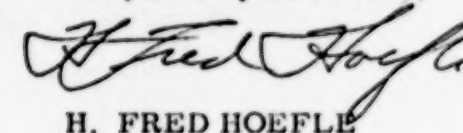
While the briefs in the Supreme Court of Ohio were filed prior to the decisions of this Court in Gregg v. Georgia, ___ US ___, 96 S. Ct. 2909 and the other death penalty cases decided on July 2, 1976, the issue of appellate review was argued extensively in oral argument before the Ohio Supreme Court. All proceedings in the Ohio Court of Appeals had terminated before Gregg, et. al. were decided. Further, the unconstitutionality of the Ohio Statutory scheme for imposition of the penalty of death was attacked from the trial court through all Ohio reviewing courts.

Respondent asserts that the issue presented concerning the burden of proof of a mitigating circumstance in light of Mullaney v. Wilbur was also neither briefed nor argued at any stage of the State appellate proceedings. That issue was argued briefly before the Ohio Supreme Court, and counsel recalls that Justice Celebrezze directed a specific question in this area to counsel for the Respondent during that argument.

While much is required of defense counsel in criminal cases, clairvoyance is not as yet a constitutionally required trait, and defense counsel are not required to anticipate the decisions of this Court, O'Connor v. Ohio, 385 US 92 (1966). It is sufficient that the constitutionality of the Ohio statutes was attacked consistently throughout the proceedings below. A review of the transcript of proceedings of the argument in the trial court on Petitioner's motion attacking the Ohio death penalty statutes reveals that many of the concerns manifested by this Court in the Gregg pentad were raised below.

The Petition for a writ of certiorari should be granted in this case and the judgment below reversed.

Respectfully submitted,



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IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

Supreme Court, U. S.

FILED

AUG 11 1977

MICHAEL W. WALKER, JR., CLERK

NO. 76-6513

WILLIE LEE BELL,

Petitioner,

v.

THE STATE OF OHIO,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

BRIEF FOR PETITIONER

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IN THE
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OCTOBER TERM, 1977

NO. 76-6513

WILLIE LEE BELL,

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v.

THE STATE OF OHIO,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

BRIEF FOR PETITIONER

BRIEF FOR PETITIONER

Willie Lee Bell respectfully submits this brief on his behalf.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio [A. 130], reported at 48 Ohio St.2d 270, 358 NE.2d 556, and the opinion of the Court of Appeals for the First Appellate District of Ohio [A. 144], not yet reported, are reproduced in the Appendix.

JURISDICTION

Jurisdiction of this Court is based on the order of the Court granting the Petition for a Writ of Certiorari to the Supreme Court of Ohio, entered June 27, 1977, and is invoked under 28 USC § 1257 (3), the Petitioner having asserted below and in this Court a denial of rights secured to him by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves certain provisions of the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States, the Ohio statutes governing the infliction of the penalty of death, and certain other Ohio statutes:

A. THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

In pertinent part, the Sixth Amendment provides:

"In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by . . . jury."

B. THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

C. THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

In pertinent part, the Fourteenth Amendment provides:

". . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

D. THE OHIO AGGRAVATED MURDER STATUTES:

§ 2903.01 Aggravated murder

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

§ 2929.02 Penalties for murder

(A) Whoever is convicted of aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.03 and 2929.04 of the Revised Code. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

(B) Whoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life. In addition, the offender may be fined an amount fixed by the court, but not more than fifteen thousand dollars.

(C) The court shall not impose a fine in addition to imprisonment or death for aggravated murder, or in addition to imprisonment for murder, unless the offense was committed with purpose to establish, maintain, or facilitate an activity of, a criminal syndicate as defined in section 2923.04 of the Revised Code, or was committed for hire or for purpose of gain.

(D) The court shall not impose a fine or fines for aggravated murder or murder which, in the aggregate and to the extent not suspended by the court, exceeds the amount which the offender is or will be able to pay by the method and within the time allowed without undue hardship to himself or his dependents, or will

prevent him from making reparation for the victim's wrongful death.

§ 2929.03 Imposing sentence for a capital offense

(A) If the indictment or count in the indictment charging aggravated murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;

(2) By the trial judge, if the offender was tried by jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a

psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.

§ 2929.04 Criteria for imposing death or imprisonment for a capital offense

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

THE OHIO COMPLICITY (AIDER AND ABETTOR) STATUTE:

OHIO REVISED CODE

E. Complicity. § 2923.03, R.C.

1. Text of § 2923.03, R.C., eff. 1-1-74.

§ 2923.03 (A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:

(1) Solicit or procure another to commit the offense;

(2) Aid or abet another in committing the offense;

(3) Conspire with another to commit the offense in violation of § 2923.01, R.C.;

(4) Cause an innocent or irresponsible person to commit the offense.

(B) It is no defense to a charge under this section that no person with whom the accused was in complicity has been convicted as a principal offender.

(C) No person shall be convicted of complicity under this section unless an offense is actually committed, but a person may be convicted of complicity in an attempt to commit an offense in violation of § 2923.02, R.C.

(D) No person shall be convicted of complicity under this section solely upon the testimony of an accomplice, unsupported by other evidence.

(E) It is an affirmative defense to a charge under this section that, prior to the commission of or attempt to commit the offense, the actor terminated his complicity, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

(F) Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section, or in terms of the principal offense.

QUESTION PRESENTED

Whether the imposition of the sentence of death for the crime of aggravated murder under the laws of the State of Ohio (effective January 1, 1974) violates the protection against cruel and unusual punishment secured to all persons by the Eighth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

On the evening of October 16, 1974, Petitioner, Willie Lee Bell, then 16 years of age, met a casual friend named Samuel Hall, who was 18 years old, at a youth center in the Avondale section of the City of Cincinnati, Hamilton County, Ohio. Petitioner, who had been smoking marijuana, ingested mescaline before the two young men left the center and went to Hall's home a short distance away. Hall borrowed his brother's Pontiac auto, and drove Petitioner around the area. As they passed the Park Lane Apartments, Hall turned into the apartment property and followed a 1974 Chevelle into the parking garage. As the Chevelle parked, Hall got out of the Pontiac, taking from a place of concealment between the front seat and the left door, a sawed-off shotgun [R. 337].

Leaving Petitioner in the auto, Hall approached the driver of the Chevelle, 64 year old Julius Graber, accosted him with the shotgun, relieved him of his keys, and forced Mr. Graber into the trunk of his own car. Hall then entered the Chevelle and signalled Petitioner to assume control of the Pontiac and to follow the Chevelle. Petitioner complied, and followed Hall to Hall's residence. Hall parked his brother's Pontiac and directed Petitioner to drive the Chevelle. Following Hall's directions, Petitioner drove the Chevelle generally westward through Cincinnati, and finally proceeded up Groesbeck Road. As the Chevelle proceeded past Spring Grove Cemetery, Hall directed Petitioner to pull into a service drive, but the order came too late, and Petitioner had passed the drive. Petitioner placed the car in reverse and backed up the service drive a short distance. He asked

Hall "What we was going to do now?" Hall replied, "We'll see. Give me the keys." [R. 340].

Petitioner gave the keys to Hall, who opened the trunk, released Mr. Graber from the car, and marched him up the service road into the dark forested area to the rear of the cemetery. Petitioner remained at the auto. A shot was heard, and Mr. Graber cried to Hall not to shoot him again. Hall ran out of the darkness, reloaded the single-shot weapon with a shell from the vicinity of the back seat, and returned up the service drive into the woods, from where another shot was heard shortly thereafter. Hall returned alone to the auto and took the wheel. He drove to Dayton, where he and Petitioner spent the night with friends of Hall. [R. 340].

The cemetery service drive was across the road from the entrance of an apartment complex where resided one Robert Pierce. [R. 165]. Pierce noticed the Chevelle in the service drive as he returned home from his employment at approximately 10:45 P.M. He parked in the parking lot and remained in his car to listen to the baseball game on his car radio. He heard two car doors close, a voice saying "don't shoot me," and two shots. He saw an individual get into the Chevelle, slide across the front seat, heard two car doors close and saw the Chevelle leave the service drive. He went into his apartment and called the police. [R. 156-166].

The police responded quickly, and found Mr. Graber lying face down in a wooded area several feet from the service drive, and 176 feet from Groesbeck Road [R. 221]. He had suffered from two wounds: a slight wound about 1" in diameter to his right cheek, and a massive wound in the back of his head. He died on the way to the hospital without regaining consciousness. It was later discovered that Mr. Graber had secreted money and other valuables in his shoes.

The next day, Hall was arrested near Dayton by an Ohio state policeman while driving a car he had stolen at gunpoint, with the owner of the car in the trunk. Petitioner, following Hall in Mr. Graber's Chevelle, continued past the officer and Hall, obtained directions, and returned to Cincinnati. He abandoned the auto in the garage of an abandoned apartment house a block from his home, and returned home.

Petitioner continued to take drugs after the killing as he had done before for three years, on a daily basis [A. 74-76], and about a week after the killing of Mr. Graber, Petitioner voluntarily accompanied police to headquarters to answer questions about Samuel Hall. When it became apparent that Petitioner was a suspect in the Graber slaying, he was warned of his constitutional rights and gave a statement to the police admitting the facts as set forth herein, but specifically denying any participation in the killing, and denying that he knew what Hall's intentions were when Hall marched Mr. Graber up the service drive at gunpoint. [Petitioner's statement was recorded and replayed at the trial, and appears in the Record at 331-353].

Petitioner was charged in the Juvenile Division of the Court of Common Pleas and was bound to the Hamilton County, Ohio Grand Jury for consideration as an adult offender, as provided by Ohio law [A. 1]. He and Hall were jointly charged in a four-count indictment, charging the two with two counts of aggravated murder, one count each of aggravated robbery and kidnapping, and with two specifications of aggravating circumstances, thus making the crime a capital offense [A. 3-7].

Petitioner entered a plea of not guilty and not guilty by reason of insanity, and a panel of three psychiatrists was appointed to report to the court on his present mental condition. That report [A. 38, *et. seq.*] concluded that Petitioner was sane, although he had had prior contact with psychiatrists because "he claims the principal thought he was crazy." [A. 39]. His I.Q. was estimated at 90, and his drug involvement was detailed. It was concluded that, although he suffered from a moderately diminished capacity to comprehend the seriousness of his predicament [R. 12; 18; 26] he was capable of standing trial and assisting counsel. At the hearing, Petitioner was found capable of standing trial and a motion to suppress his statement was denied [A. 15; A. 119]. Thereafter, Petitioner waived a jury trial, and a three-judge panel proceeded to try the case [A. 12-14].

At the trial, the only evidence as to the occurrences on the service drive was circumstantial, save Pierce's testimony and Petitioner's statement. The only other evidence linking Petitioner to the offense was evidence of his fingerprint on the outside of the left window of Mr. Graber's auto [R. 420-430]. Petitioner was found guilty on one count of aggravated murder, the specification to that count of an aggravating circumstance, aggravated robbery, and kidnapping [A. 16-17]. A further examination by the same three psychiatrists was ordered, along with a presentence report by the probation department as provided by law, and a penalty trial was scheduled.

At the penalty trial, the three judge panel heard an unsworn statement from Petitioner [A. 73-82], and testimony from three of his teachers, to the effect that he was on drugs on a daily basis for three years, and was emotionally immature both in relation to his juvenile peers and by adult standards. He was enrolled at a school for disruptive youth, young persons with emotional problems, who were not considered normal by the School Board. [A. 82-92]. A 1972 school psychiatric report was placed into evidence [A. 93] which indicated that at that time Petitioner's I.Q. was 81. [Def. Ex. 1, also referred to in the probation department report, A. 58]. One of the psychiatrists testified at the instance of the State, and indicated that the psychiatrists found that Petitioner was not psychotic or mentally deficient, and that he tested for I.Q. purposes at 110-120. He conceded that the difference in the estimated I.Q. of 90 before the trial and the test results following conviction could be explained by the fact that the lack of drugs during his stay in jail from October through January, with a regular diet and routine, would improve Petitioner's responses [A. 104-5]. The psychiatrist admitted, however, that Petitioner's three years of daily drug involvement was not considered in the post-conviction sentence report [A. 105].

A motion which had been filed attacking the Ohio death penalty as unconstitutional [A. 18] was argued in the midst of the penalty trial [A. 106-110], and was overruled [A. 113]. The panel unanimously found that none of the statutory mitigating circumstances had been established by a preponderance of the

evidence, and sentenced the Petitioner to two consecutive terms of 7-25 years imprisonment on the kidnapping and robbery counts, and to death on the aggravated murder count. [A. 20; A. 129].

Petitioner's appeal to the Ohio First District Court of Appeals was denied [A. 22], as was his appeal to the Ohio Supreme Court [A. 27]. The Ohio Supreme Court also denied rehearing [A. 35], and a stay of execution was granted pending disposition of the cause in this Court. [A. 36]. Certiorari was granted by this Court on June 27, 1977 [A. 165].

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

A motion attacking the unconstitutionality of the Ohio death penalty statutes on Eighth and Fourteenth Amendment grounds was filed in the trial court [A. 18], and was denied [A. 113]. The same challenge was made in the Court of Appeals, and was denied [A. 151]. The Ohio Supreme Court rejected the same contention [A. 135]. A Petition for rehearing was filed in the Ohio Supreme Court, detailing the unconstitutionality of the Ohio laws in light of the *Gregg* series, which had been announced after filing of the briefs in that Court. The *Gregg* arguments had been made in oral argument in the Ohio Supreme Court in October. Rehearing was denied [A. 35].

SUMMARY OF ARGUMENT

The Ohio capital punishment statutes are unconstitutional because the Ohio laws fail to require, or even to permit, the consideration of the character and record of the accused as a meaningful part of the capital sentencing process. The narrowness of the statutory mitigating circumstances, and the even narrower interpretation of those mitigating facts by the Ohio Supreme Court have resulted in a virtually mandatory death sentencing scheme with only an extremely limited exception for offenders who are

psychotic or severely retarded, whose mental defect is a primary cause of the offense. The Ohio statutes, as interpreted by the Ohio Supreme Court, have created a system where the good character and record of the offender make the death penalty more likely, rather than less likely.

The application of the statutes to this Petitioner, in particular, violate the Eighth and Fourteenth Amendments. Because of the narrow and inflexible Ohio approach that bars consideration of virtually all relevant mitigating circumstances, the judges who sentenced Petitioner to die for the killing of Julius Graber were forbidden to consider in their sentencing deliberations even the facts that Petitioner did not personally kill Mr. Graber, did not intend Mr. Graber's death, and was a minor participant in Samuel Hall's killing of Mr. Graber. The sentencing judges were similarly precluded from taking account of Petitioner's youth, emotional immaturity, drug dependence, cooperation with the police, and other mitigating factors in determining whether death or imprisonment was the appropriate punishment for his crime.

Petitioner contends that the infliction of the death penalty upon a defendant who is held vicariously liable for a homicide and is not himself found to have deliberately committed any homicidal act is disproportionate and excessive, and thus violates the constitutional guarantee against cruel and unusual punishments. Its excessiveness is particularly manifest in the case of a 16 year old defendant who has all of the other mitigating characteristics shown by this record. But even if the Eighth and Fourteenth Amendments did not absolutely forbid such a sentence in any such case, they would surely forbid a death-sentencing process in which neither Petitioner's relative lack of culpability for the killing by Hall of Mr. Graber nor Petitioner's other mitigating attributes could be taken into account and weighed by his sentencer.

The Ohio procedures for determining the appropriateness of the death penalty are inadequate for several other reasons:

First, the jury is totally excluded from the sentencing process, so that it cannot perform its historic function of assuring that there is community contribution to the decision of whether one of its citizens shall live or die. The life or death decision is made not by

the governed, but solely by agents of the State. Indeed, the defendant's election of a jury trial of the issues of guilt and degree of homicide is needlessly discouraged by the statutory capital scheme, in a manner that constitutes an independent violation of the Sixth and Fourteenth Amendments.

Second, the risk of nonpersuasion is placed upon the accused at the penalty trial. Since the sentencing authority has no discretion whatever to spare the offender's life unless one of but three narrow and exclusive mitigating circumstances exists, to a preponderance, an offender must be sentenced to die even where it is precisely as likely as not that the statutory mitigating circumstance(s) is present.

Third, the Ohio appellate courts conduct no meaningful sentencing review. Their consideration of the mitigating facts present in any given capital case is restricted by a doctrine of excessive, even total, deference to the trial court's findings as to the existence of mitigating circumstances. Although the Ohio Supreme Court is the only Ohio court with statewide appellate jurisdiction, it conducts no comparative review of death sentences from case to case to assure consistency, regularity and evenhandedness in capital sentencing.

ARGUMENT

THE IMPOSITION OF THE SENTENCE OF DEATH FOR THE CRIME OF AGGRAVATED MURDER UNDER THE LAWS OF THE STATE OF OHIO (EFFECTIVE JANUARY 1, 1974) VIOLATES THE PROTECTION AGAINST CRUEL AND UNUSUAL PUNISHMENT SECURED TO ALL PERSONS BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

In *Furman v. Georgia*, 408 U.S. 238 (1972), this Court struck down capital punishment as it was then applied by the states on the

basis that the death penalty as applied violated the prohibition against cruel and unusual punishment contained in the Eighth Amendment to the Constitution of the United States, which prohibition had previously been applied to the states through the Fourteenth Amendment, *Robinson v. California*, 370 U.S. 660 (1962).

After the decision in *Furman*, most state legislatures, including the Ohio General Assembly, attempted to fashion new statutory schemes for the imposition of the death penalty which would withstand constitutional challenges based on *Furman*. The new Ohio aggravated murder statutes here under attack were enacted by the Ohio legislature and went into effect on January 1, 1974.

On July 2, 1976, this Court decided five cases construing statutory capital punishment provisions enacted by five states in response to *Furman*: *Gregg v. Georgia*, 428 U.S. 153; *Jurek v. Texas*, 428 U.S. 262; *Proffitt v. Florida*, 428 U.S. 242; *Woodson v. North Carolina*, 428 U.S. 280; and *Stanislaus Roberts v. Louisiana*, 428 U.S. 325. The Court, stating that "each distinct system must be examined on an individual basis," *Gregg v. Georgia, supra.*, 428 U.S. at 195, held that capital punishment is not *per se* unconstitutional as cruel and unusual, upheld the death penalty under the Georgia, Florida and Texas statutes, and rejected as unconstitutional the mandatory death penalties provided by North Carolina and Louisiana.

It shall be demonstrated that the Ohio legislature, in attempting to frame a constitutional scheme for the imposition of the death penalty prior to the clarification of the *Furman* decision by the *Gregg* series fashioned a death penalty statute that is mandatory for all practical purposes, providing only an extremely limited exception to offenders who are psychotic or severely mentally retarded. Misapprehending the constitutional requirements enunciated by *Furman*, the legislature created a rigid, arbitrary process which ignores the command of the Constitution requiring a fair and equitable procedure "to select persons for the unique and irreversible penalty of death," *Woodson v. North Carolina, supra.*, 428 U.S. at 287.

I.

OHIO HAS CONSTITUTIONALLY CONDEMNED PETITIONER TO DEATH UNDER A SENTENCING SCHEME, MANDATORY FOR PRACTICAL PURPOSES, WHICH PRECLUDES THE MEANINGFUL CONSIDERATION OF THE CHARACTER AND RECORD OF THE OFFENDER, AND EVEN OF THE DEGREE OF HIS INVOLVEMENT IN THE CAPITAL CRIME, AS RELEVANT FACTORS IN THE DECISION OF WHETHER HE SHALL LIVE OR DIE.

In the five cases decided by this Court on July 2, 1976, referred to herein collectively as "the *Gregg* series," the Court analyzed the statutory schemes of five states, with a view toward determining whether each state provided for the meaningful consideration of the character and record of the offender as particularized mitigating factors. The Court held that such consideration was required by the Eighth Amendment:

... we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment ... requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

Woodson v. North Carolina, supra., 428 U.S. at 304, (Emphasis added).

In support of the conclusion that the Constitution requires consideration of the character and record of the offender, the Court stated in *Woodson*, also at 428 U.S. 304:

A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual

human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

In *Woodson* and *Stanislaus Roberts*, this Court rejected as unconstitutional the mandatory death penalty statutes of North Carolina and Louisiana, respectively. As the Court concluded in *Stanislaus Roberts*:

The Eighth Amendment, which draws much of its meaning from "the evolving standards of decency that mark the progress of a maturing society," *Trop v. Dulles*, 356 U.S. 86, 101, simply cannot tolerate the reintroduction of a practice so thoroughly discredited.

428 U.S. at 336.

One basis for the Court's ruling that mandatory capital punishment statutes are unconstitutional was that the development of a mature society involves an enhancement of civilized values away from the concept that all persons convicted of a particular crime deserve the death penalty. In such a developing society, the Constitution contemplates consideration of contemporary community values in determining what punishment is cruel and unusual under the Eighth and Fourteenth Amendments. The Court found that "the practice of sentencing to death all persons convicted of a particular offense has been rejected as unduly harsh and unworkably rigid," *Woodson, supra.*, 428 U.S. at 293. A mandatory scheme is offensive to the Constitution because "under contemporary standards of decency death is viewed as an inappropriate punishment for a substantial portion of convicted first-degree murders," *Id.*, at 296. It was found to be "evident that the post-*Furman* enactments [of state death penalty schemes] reflect attempts by the States to retain the death penalty in a form consistent with the Constitution, rather than a renewed societal acceptance of mandatory death sentencing," *Id.*, at 298.

Another reason for condemning mandatory capital punishment was that a mandatory statute does not and cannot provide for the consideration of the particularized mitigating factors of the character and record of the offender which the Court has held to be

constitutionally required. In *Harry Roberts v. Louisiana*, ____ U.S. ____, 97 S. Ct. 1993 (1977), this Court again found Louisiana's mandatory death penalty in violation of the Eighth and Fourteenth Amendments, even where the victim of the murder is a police officer engaged in his duties when slain. It is evident, therefore, that mandatory death penalty statutes are unconstitutional, and that if Ohio's scheme is mandatory in substance and practice, it is unconstitutional.

A. THE OHIO CAPITAL PUNISHMENT STATUTES ARE SO NARROW AND RIGID THAT THEY AFFRONT THE CONSTITUTIONAL PRINCIPLES FORBIDDING MANDATORY DEATH SENTENCES.

Before detailing the reasons that Ohio's capital sentencing scheme is virtually mandatory, we note that our view is shared by no less an authority than Judge Whiteside, of the Court of Appeals in Franklin County, Ohio, and who sat by designation at the appellate level below.¹ Judge Whiteside is the author of the leading manual on appellate practice in Ohio.² In an unreported case, which was later affirmed by the Ohio Supreme Court, *State v. Harris*,³ Judge Whiteside characterized the Ohio death penalty as "mandatory," a view which was quoted *in toto* by the Court of Appeals below, which quoted that conclusion, stating that Judge Whiteside's language was "cited with approval," [A. 151]. Our own Court of Appeals has, therefore, characterized the Ohio capital statutes as "mandatory." The Ohio Supreme Court ignored the characterization.

¹Judge Whiteside sat on our panel in the Court of Appeals, being designated for that purpose because Judge Keefe, who presided at Petitioner's trial, had been elected to the Court of Appeals and was disqualified from hearing Petitioner's appeal.

²Whiteside, *Ohio Appellate Practice*, Banks-Baldwin (1975).

³*State v. Harris*, unreported, #74AP-580, affirmed 48 Ohio St.2d 351, 359 N.E.2d 67.

While the Ohio death penalty is not absolutely mandatory, Ohio's capital statutes are "unduly harsh and unworkably rigid" within the meaning of the language and the reasoning of the Court in *Woodson, supra.*, 428 U.S. at 293, because they arbitrarily compel a death sentence in virtually every case where the offender is convicted of aggravated murder with specifications. Following such a conviction, the sentencing authority is not "allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed," *Jurek v. Texas, supra.*, 428 U.S. at 271. The convicted offender can avoid the death penalty only where the trier of the fact at the penalty trial finds that one of three exclusive mitigating circumstances is established by a preponderance of the evidence: (1) the victim of the offense induced or facilitated it; (2) it is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion or strong provocation; or (3) the offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity, R.C. 2929.04(B).

It is apparent that the determination of the existence of any of these three mitigating circumstances involves nothing more than strictly limited fact-finding by the sentencing authority. If that authority finds that any of the enumerated facts exists, the offender's life is spared; if the trier of the fact fails to find that one of the three mitigating facts established by the statutes exists, it has no alternative but to sentence the offender to death—there is no discretion to extend mercy. The removal of sentencing discretion in Ohio capital cases is not accidental. The Ohio Senate Judiciary Committee felt obliged to "[r]efine the House position by retaining the death penalty, but remov[ing] from the judge and jury [later deleted] as much discretion as possible in the punishment determination procedure." Lehman and Norris, *Some Legislative History and Comments on Ohio's New Criminal Code*, 23 *Cleve. State L. Rev.* 8, 18, 20 (1974).⁴

⁴The authors were the co-sponsors of the new criminal code in the Ohio legislature; that code includes the capital punishment statutes here under attack.

The lack of discretion in the sentencing authority, coupled with the narrowness of the statutory mitigating circumstances, together with the even narrower construction of the statutory mitigating factors by the Ohio Supreme Court, have created, for all practical purposes, a mandatory death penalty process in Ohio, with one limited exception—that the offender's psychosis or mental deficiency is a primary cause of the offense.

Any other offender convicted of aggravated murder and a specification of an aggravating circumstance has no meaningful chance to survive the sentencing process.

The first Ohio mitigating factor, that the victim of the offense induced or facilitated his own aggravated murder, will rarely, if ever, be applicable. It must be recalled that one of the aggravating circumstances must be present in order for the mitigating fact to be important, as without the aggravation, the homicide is not a capital offense. Except in the rarest and most improbable factual situations, there is a basic inconsistency between any of the aggravating circumstances and this first mitigating circumstance to the extent that the existence of the aggravating circumstance will negate the existence of the mitigating circumstance. Thus, the first mitigating circumstance is practically inconsequential.

The second mitigating circumstance, that it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion or strong provocation is also essentially illusory. Wherever these factors exist, they constitute defenses to the capital charge itself. Either duress or coercion is a complete defense to the charge; and strong provocation is grounds for an acquittal of aggravated murder and a conviction of the lesser offense of voluntary manslaughter.⁵ The Ohio Supreme Court, in *State v. Woods*, 48 Ohio St.2d 127, attempted to salvage part of the second mitigating circumstance from total absorption by the traditional defenses by construing the words "duress" and "coercion" to mean domination by another, or undue influence,

⁵Under R.C. 2903.03, voluntary manslaughter is the knowing killing of another "while under extreme emotional stress brought on by serious provocation sufficient to incite him into using deadly force."

48 Ohio St.2d at 126-137, but this reformulation has given the mitigating circumstance no broader effect. To date, the Ohio Supreme Court has reviewed two capital cases in which there was evidence of domination of the offender by others involved in the homicide: *Woods*, and this case, *Bell*. In each case, that Court acknowledged that the offender was dominated by others, but affirmed the death penalty because each offender had an opportunity to quit the venture before the homicide, and did not do so. By invoking the doctrine of withdrawal to defeat a claim of the existence of the mitigating fact of duress or coercion, the Ohio court has negated completely the softening of the definition of those factors set forth in *Woods*, thereby rendering the factors meaningless. The doctrine of withdrawal functionally limits this kind of mitigation, despite its verbal redefinition, to the same kind and degree of coercion that constitutes a defense to the offense itself.⁶ Practically, therefore, a conviction of aggravated murder will preclude the trier of the fact at the penalty trial from finding that duress or coercion are present as a mitigating circumstance.

No reported case from the Ohio Supreme Court has yet construed the meaning of "strong provocation" as used in the Ohio capital statute, but, as we have indicated, the finding of such provocation will constitute a reductive fact which will reduce the offense from capital murder to voluntary manslaughter. Its inclusion as a mitigating factor will also be useless, as it will never be utilized under any foreseeable fact situation. To prove the mitigating circumstance is to prove a defense to the capital crime itself.

As to the third mitigating circumstance, that "the offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the

⁶In *Woods*, the Court held that as mitigation, duress or coercion had to be such as to "overcome the mind or will of the defendant so that he acted other than he ordinarily would have in the absence of those influences." Overcoming the will to resist and the acting of the defendant against his will are defenses to the charge, and, if proved, constitute a defense to the crime itself, negating as they do the implicit element of *mens rea*.

defense of insanity," the Ohio Supreme Court has also attempted to soften the definition so that it is now swallowed up by the traditional defense of insanity.⁷ The result has been to produce an exceedingly narrow all-or-nothing mitigating circumstance which precludes the death penalty absolutely if it is found to exist, but which can almost never be found as a matter of fact. Apart from this extreme state, the defendant's mental condition may not be considered at all as part of the capital sentencing process. .

A psychotic offender will qualify for mitigation only if the offense is somehow "primarily the product of [his] . . . psychosis" but is not connected with the psychosis in any of the ways that support Ohio's insanity defense under *State v. Staten*, note 7 *supra*. Mental deficiency having the same kind of causal relation to the offense will also qualify in theory; but the term "mental deficiency" is not defined by statute and its judicial construction has rendered it either meaninglessly narrow or completely lacking in meaning. In *State v. Bayless*, 48 Ohio St.2d 73, at 87, 95-6, the Ohio Supreme Court defined mental deficiency as "a low or defective state of intelligence." In support of this definition, it cited *Blackiston's New Gould Medical Dictionary* to the effect that "In civil law, the condition is defined by statute as frequently divided into three grades: idiocy, the lowest; imbecility, the intermediate; and moronity, the highest." The Ohio court in *Bayless* also relied on the definition in *Schmidt's Attorney Dictionary of Medicine*: "In law, mental deficiency is usually divided in three grades: idiocy, imbecility and moronity. Idiocy is the most severe form, moronity the highest."

The Ohio Supreme Court's limitation of mental deficiency to these three categories is significant. A moron is defined as a feeble-minded person whose mental age is between 8 and 12 years, an imbecile is one whose mental age is between 2 and 7 years and

⁷Ohio's insanity defense is that one is not responsible for criminal conduct if, "at the time of the crime, as the result of mental disease or defect, he does not have the capacity either to know the wrongfulness of his conduct or to conform his conduct to the requirements of the law." *State v. Staten*, 18 Ohio St.2d 13 (1969).

an idiot is such a person whose mental age is below 2 years. *Dorland's Illustrated Medical Dictionary*, 23rd Ed. (Saunders, 1957). In I.Q. figures, a moron's I.Q. is between 50 and 70, an imbecile's between 20 and 50, and an idiot's I.Q. is between 0 and 20. Chaplin: *Dictionary of Psychology*, New Rev. Ed. (Laurel, 1975). Thus, in its first capital case, the Ohio Supreme Court construed the only statutory mitigating circumstance dealing with the personal characteristics of the offender as mandating death unless he is psychotic or is a retarded person with a mental age of less than 12, and an I.Q. of less than 70. And, as the Court recognized, under the terms of the statute, psychosis and mental deficiency even if found to exist under these narrow definitions will not preclude the imposition of the death penalty unless that mental aberration is the primary cause of the offense, 48 Ohio St.2d at 96.

Then, a month later, in *State v. Black*, 48 Ohio St.2d 262, 358 N.E.2d 551, the Ohio Supreme Court softened its definition somewhat and held that "any mental state or incapacity may be considered. *Id.* at 268, but then refused to define what it meant because "to define terms such as those used in the statute is to narrow them" [!] *Id.* It reiterated, however, that even psychosis or whatever it meant by "mental deficiency" would not preclude the death penalty unless it was the primary cause of the offense. 48 Ohio St.2d at 268.

In our case, the Court stated that age (senility as well as youth) was a primary factor in determining mental deficiency, but rejected Petitioner's contention that by age alone he was as a matter of law, mentally deficient, and upheld the death sentence rendered against this 16 year old offender.

The Ohio Supreme Court, in two cases decided on December 27, 1976, made it clear that, whatever the meaning of its language in *Black*, it was not about to retreat from the narrow, restrictive interpretation it had placed on "mental deficiency" in *Bayless*.

In *State v. Harris*, 48 Ohio St.2d 351, 359 N.E.2d 67, the Court upheld the death sentence for a juvenile defendant who was, it conceded, a recognized sociopath. In that case, it is interesting to note that in rejecting the contention that the offense was primarily the product of mental deficiency in that the offender was a drug

addict, the Ohio court cited the fact that the record was devoid of evidence that the defendant was under the influence of drugs when the offense was committed. In our case, evidence at the penalty trial clearly established that Petitioner *was* under the influence of drugs at the time of the offense. That fact, however, made no difference to the Ohio courts.

In *State v. Royster*, 48 Ohio St.2d 381, 358 N.E.2d 616, the Court upheld the death sentence for an offender whose I.Q. was measured at 75 in 1962, 61 in 1966, and 54 in 1968, apparently indicating the offender was retrogressing through the range of moronity and approaching imbecility. However, Royster's sentence was upheld because ". . . the testimony of the psychiatrists did not equate I.Q. with mental deficiency."⁸ 358 N.E.2d at 622. By thus rejecting the use of I.Q. as determinative of the existence of mental deficiency, the Ohio Supreme Court undercut the rationale behind its own extremely narrow definition of that term. It thereby affirmed Royster's death sentence.

In *State v. Edwards*, 49 Ohio St.2d 31, 358 N.E.2d 1051, the Ohio Supreme Court refused to equate mental deficiency with educational deficiency. And in *State v. Weind*, 50 Ohio St.2d 224, ____ N.E.2d ____, the Court upheld a capital sentence where one of the psychiatrists originally stated that the defendant was psychotic at the time of the offense, but could not so state to a reasonable medical certainty although there was, he later testified, a "possibility of an acute break" at the time of the crime, *Id.* at 232.

We cannot overemphasize the fact that the mitigating factor involving psychosis or mental deficiency as the primary cause of the offense is the only Ohio mitigating circumstance which involves the characteristics of the offender as opposed to the circumstances of the crime. Yet even this mitigating fact includes a significant qualification that has to do with the offense rather than the offender: the offense must be primarily caused by the mental

⁸The psychiatrist did say that the decrease in I.Q. scores was due to "developing characteristic traits" and the defendant's "unwillingness to cooperate with the examiner", but we wonder how he could have so concluded as to tests given as long before as 15 years.

condition of the offender. Thus, even a moron, imbecile or idiot may be put to death in Ohio where it does not appear to a preponderance of the evidence that his mental condition was a *primary* cause of the offense.

Viewed from the perspective of the three statutory circumstances that are recognized as mitigating, Ohio's capital sentencing scheme thus operates for all practical purposes as a mandatory death penalty statute. The "mitigating circumstances" are not factors to be weighed in the exercise of a focused sentencing discretion, but define an exceedingly narrow set of conditions — almost never found in fact — under which the death sentence is precluded with the same mechanical rigidity with which it is required to be imposed in all other cases of aggravated murder. Realistically, the only offenders who can survive the sentencing process are extremely abnormal cases: psychotics and extreme mental retardates whose mental condition is a primary cause of the offense. Every other capital offender (excepting those in a few hypothetically definable but factually implausible situations) must be sentenced to die. This fact is underscored by the fact that the Ohio Supreme Court, interpreting the mitigating facts as narrowly as possible, has affirmed *every* capital sentence to date where the conviction on which that sentence is based was upheld.

But there is another, equally important perspective from which the Ohio statutes should be examined: the perspective of the circumstances which are *not* recognized as mitigating. This perspective, to which we now turn, emphasizes the extent of Ohio's failure to accord to capital defendants the individualized sentencing determination which this Court has held to be required by the Eighth and Fourteenth Amendments.

B. THE OHIO CAPITAL SENTENCING STATUTES PRECLUDE THE MEANINGFUL CONSIDERATION OF THE CHARACTER AND RECORD OF THE OFFENDER AS PART OF THE CAPITAL SENTENCING PROCESS.

This Court has emphasized the importance of considering the character and record of the offender among the particularized mitigating factors which must constitutionally be taken into account in any capital sentencing determination. Such consideration is a "constitutionally indispensable part of the process of inflicting the penalty of death," *Woodson v. North Carolina*, *supra.*, 428 U.S. at 304.

The Ohio statutory scheme for the imposition of the death penalty, by its very nature, affirmatively precludes consideration by the sentencing authority of those essential factors as part of the sentencing process. It is true that the statutory language makes reference to the history, character and condition of the offender, as well as the circumstances of the offense; and the Ohio Supreme Court relied upon this language in sustaining the constitutionality of the statute in *State v. Bayless*, *supra.*, 48 Ohio St.2d at 86. But it is critical to note precisely what the statute says, and what the Ohio Supreme Court confirmed in *Bayless* and all subsequent cases that the Ohio statute requires, in regard to the specific and limited purpose for which the offender's background is to be used: R.C. 2929.04 (B), the sole provision referring in any way to offender-related factors, provides that:

... the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense, and the history, character, and condition of the offender, one or more of the following [three enumerated mitigating circumstances] is established by a preponderance of the evidence (Emphasis added).

What follows, of course, is the specification of the three factors previously discussed: victim inducement, duress/coercion/provocation, and psychosis or mental deficiency primarily causing the offense. It is those three factors, and those three alone, which may be considered in determining whether the death penalty shall

be imposed. The direction of the statute to the sentencing authority to consider the offender's background is a direction to cull from that background only such evidence as is relevant and material in the determination of whether any of the three narrow statutory mitigating facts exists.

Everything else in the character and record of the offender, and, indeed, facts pertaining to the circumstances of the offense, is excluded from sentencing consideration. As a result, virtually the whole of the offender's history and those characteristics and attributes which make him an individual human being must be ignored. In *Stanislaus Roberts v. Louisiana*, *supra.*, 428 U.S. at 333, this Court emphasized that the consideration to be given by the sentencing authority in a capital case to the character and record of the offender must be *meaningful*. Capital sentencing statutes which are so rigid as to forbid meaningful consideration of the character and record of the capital offender in the sentencing process are unconstitutional because they treat "all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." *Woodson v. North Carolina*, *supra.*, 428 U.S. at 304.

Ohio's statutes are as rigid and blind as those from Louisiana and North Carolina, since the three enumerated circumstances on which the ultimate Ohio sentencing decision depends are such that the character and record of the individual offender have almost nothing to do with whether or not any of those mitigating circumstances exist, and, ultimately, have almost nothing to do with whether the offender lives or dies.

Specifically, the character and record of the offender have nothing to do with whether or not the victim induced or facilitated his own demise. Either he did or he did not, and whether the offender had a good or bad character, or prior record, will not have any meaningful impact on the decision as to whether the victim actually induced his own death at the hands of the accused.

Similarly, only minor fragments of the character and record of the offender can have any relevance or materiality in enabling the

sentencing authority to determine whether the offender was acting under duress, coercion or strong provocation. This second mitigating circumstance involves a situation existing at the time and place of the crime. One with good character and no prior criminal record is not more likely, because of his character or record, to be susceptible to duress, coercion or provocation than is one with a bad character and/or a poor record. Indeed, logic indicates the opposite to be true, in which case, the good character and absence of a criminal record could cost the offender his life.⁹ The vastly larger part of an offender's character and record simply has nothing to do with whether or not the mitigating circumstance can be established.

Finally, the determination whether the primary cause of the offense was the psychosis or mental deficiency of the offender involves an inquiry into an extremely narrow and isolated aspect of the offender's psyche, excluding the whole remainder of his character and record from meaningful consideration. One who has no prior record and is of good character may or may not be psychotic or mentally deficient, and even the presence or absence of psychosis or mental deficiency is irrelevant to the capital decision in Ohio unless such mental condition was the primary cause of the offense. Here too the good character and lack of a record probably tends more in the usual case to negate the mitigation rather than to establish it. Thus, ~~the~~ ^{the} ~~offender's~~ ^{offender's} ~~past~~ ^{past} is likely to cost the offender his life.¹⁰

⁹In fact, one with a good character and no criminal record would be *less* likely to succumb to improper coercion or duress, and less likely to lose control in the face of provocation to such an extent that he would take the life of another under circumstances which would amount to aggravated murder under Ohio law. In such a case, the offender would be *penalized* for his good character and absence of a prior record, as those circumstances would make it less likely that the mitigating circumstance would be found to exist. His prior good character and absence of prior record would cost him his life.

¹⁰Assuming that psychotics and mental deficient would have more contacts with law enforcement, and more character defects than normal citizens, the logic contained in note 10 would apply equally here. — good character and absence of prior criminal activity would make it less likely rather than more likely that the offense was a product of psychosis or mental deficiency, with the same result — the good character and absence of a record would tend to negate existence of the mitigating circumstance and would cost the offender his life.

It is clear that, under the Ohio capital sentencing scheme, the history, character and condition of the offender may be utilized solely in the determination of whether any of the statutory mitigating factors exist. Since the vastly larger part of the offender's history, character and condition — virtually everything that makes him a unique and individual human being — has nothing to do with the existence of the three statutory mitigating factors, the personalized characteristics of the offender cannot be considered meaningfully in the capital sentencing process, which the Constitution requires, *Woodson, supra.*, 428 U.S. at 304. An examination of the 26 capital cases decided to date by the Ohio Supreme Court reveals that, while the character and record of the offender may be discussed occasionally by that Court, there is no case among them in which the character and record of the offender has had any ~~meaningful~~ ^{meaningful} impact upon the ultimate life or death decision. We submit that, if for no other reason, the absence of *meaningful* consideration of the character and record of the offender in Ohio's capital sentencing process renders the Ohio capital punishment statutes unconstitutional. Their preclusion of consideration of the individual attributes and characteristics of the offender is strikingly demonstrated in Petitioner's case, as we shall next illustrate. Certainly as applied to him (Cf. *Chambers v. Mississippi*, 410 U.S. 284 [1973]), the statutes forbade consideration of sentencing factors that must constitutionally be considered if the infliction of the death penalty is to be kept consistent with "contemporary standards of decency," *Woodson v. North Carolina, supra.*, 428 U.S. at 296.

C. MANY MITIGATING FACTORS CONSIDERED BY THIS COURT AND BY OTHER JURISDICTIONS AS IMPORTANT FACTORS IN THE CAPITAL SENTENCING PROCESS ARE APPLICABLE TO PETITIONER BUT ARE FORECLOSED TO HIM UNDER OHIO LAW.

In *Gregg v. Georgia, supra.*, 428 U.S. at 197, this Court indicated some mitigating circumstances which would "mitigate against imposing capital punishment:"

Does he have a record of prior convictions for capital offenses? Are there any special facts about this defendant that mitigate against imposing capital punishment (*e.g.*, his youth, the extent of his cooperation with the police, his emotional state at the time of the crime.)

In *Harry Roberts v. Louisiana*, ___ U.S. ___, 97 S. Ct. at 1996, the Court stated:

Circumstances such as the youth of the offender, the absence of any prior conviction, the influence of drugs, alcohol or extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct are all examples of mitigating facts which might attend the killing of a peace officer and which are considered relevant in other jurisdictions.

As we emphasized repeatedly in [Stanislaus] *Roberts* and its companion cases decided last Term, it is essential that the capital sentencing decision allow for consideration of *whatever mitigating circumstances* may be relevant to either the particular offender or the particular offense. [Emphasis added]

Of the several mitigating circumstances cited by the Court in *Gregg* and *Harry Roberts*, all but the last apply to Petitioner, and all of those are foreclosed from consideration by the sentencing authority under Ohio law:

1. *Prior capital offenses*: Petitioner has no prior convictions for capital offenses [A.50]; 2. *Youth*: Petitioner was 16 years of age at the time of the offense for which he stands condemned to death [A. 72]; 3. *Extent of his cooperation with police*: Petitioner voluntarily submitted to questioning at the investigatory stage, and, even after receiving *Miranda* warnings, gave a statement to police admitting the facts of the case. The officer who took the statement described Petitioner as "cooperative" [R. 95]; 4. *His emotional state at the time of the crime*: Petitioner was, at the time of the crime, emotionally unstable, either by adult standards or by standards of normality for youths of his age [A. 84, 87, 91] (see also the probation department report [A. 58-91]; 5. *The influence of drugs*: Petitioner had used drugs on a daily basis for

about three years preceding the offense herein [A. 74-76]; he was described by three of his teachers as constantly on drugs, including during the week between the offense herein and his arrest [A. 82-92]; he told the psychiatrists that the best thing that ever happened to him was "when he gets high," [A. 39].

The five mitigating facts set forth above are all facts which this Court, in recent decisions, has stated are important enough to merit consideration in the capital sentencing process. All are applicable to Petitioner. None have any meaningful effect on the decision of whether he shall live or die, because of the narrowness of the Ohio statutory mitigating circumstances. This Court has stated that these factors should make a difference. Here, they did not because under Ohio's statutes they could not.

The Model Penal Code recommends no less than eight mitigating circumstances, including several applicable to Petitioner but also unavailable under Ohio law: youth; no significant history of prior criminal activity; the defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor; the accused acted under domination of another person, and, at the time of the offense, the capacity of the accused to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of . . . intoxication. *Model Penal Code* §210.6 (Proposed Official Draft, 1962). These circumstances are also set forth in the Appendix in *McGautha v. California*, 402 U.S. 183, at page 225. It was stated in the probation report that Petitioner was under the influence of the codefendant, Hall [A. 60]. The Ohio Supreme Court admitted as much in its opinion, 48 Ohio St. 2d at 282 [A. 142]. He was under the intoxicating influence of drugs the night of the offense and stated at the penalty trial that his ability to resist Hall's domination was hampered by the drugs. [A. 79-80]

This Court's recognition that, under contemporary standards of morality, not "every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a

particular offender,'¹¹ is confirmed by the record of capital legislation enacted since July of 1976. The most recently passed death penalty statutes have commonly allowed consideration of any circumstance deemed mitigating by the sentencer,¹² and have in no case defined mitigating factors as restrictively as did the Ohio legislature.¹³ Taken together with eleven pre-*Gregg* statutes still in effect which either allow consideration of any mitigating circumstance¹⁴ or a broad range of specified factors,¹⁵ the severe

¹¹*Stanislaus Roberts v. Louisiana, supra*, 428 U.S. at 333 (plurality opinion).

¹²Del. Code § 4209(c) (1977 amendment); Idaho Code § 19-2515(c) (as amended by 1977 Idaho Sess. Laws ch. 154, § 4); Smith-Hurd Ill. Ann. Stat. c.38 § 9-1(c) (1977 amendment); Burns Ind. Stat. Ann. § 35-50-2-9(c)(7) (1977 amendment); Baldwin's Ky. Rev. Stat. § 632.025(2) (as amended by c.15 H.B. 14 Ky. Laws of 1976); La. Code Crim. Pro. Ann., Art. 905.5 (1977 cum. ann. pocket part); Miss. Code of 1972 § 97-3-21(2) (1977 amendment); Rev. Stat. Mo. ch. 559, as amended by House Bill No. 90, 79th Gen. Ass. (1st Reg. Sess.), § 5.1(3) (1977); Nev. Rev. Stat. ch. 200, as amended by Laws of Nev. ch. 585, § 4.7 (59th Sess., approved May 17, 1977); N.C. Gen. Stat. Art. 100, § 15A-2000(f)(9), as added by Gen. Ass. Ratified Bill ch. 406 (1977); Okla. Stat. Ann. § 701.10 (1976 cum. pocket part); S.C. Code of 1962 § 16-52(C) (1977 amendment); Tenn. Code Ann. § 39-2404(j), as amended by ch. 51 Public Acts, 1977 (enacted April 11, 1977); Va. Code Ann. § 19.2-264.3(B) (1977 amendments ch. 492); Wash. Rev. Code Ann. § 9A.32.045(2), as amended by ch. 206, Laws of 1977 (enacted June 10, 1977).

¹³Of the fifteen states which have recently passed statutes allowing any mitigating factor to be considered, cited in note 12, *supra*, all but four (Delaware, Idaho, Mississippi and Oklahoma) additionally provide broad rosters of mitigating circumstances similar to the Model Penal Code.

A sixteenth state, Wyoming, does not appear to allow consideration of any mitigating circumstance but does provide a substantial roster of the sort contained in the Model Penal Code, Wyo. Stat. § 6-54.2(c), (d) and (j), as enacted by Enrolled Act No. 42, Senate, 44th Legislature of the State of Wyoming, ch. 122 (1977 Session).

¹⁴Ga. Code Ann. § 27-2534.1(b) (1974 cum. pocket part); Mont. Rev. Codes Ann. § 94-5-105(1) (1974 interim supp. part 3); Vernon's Texas Code Crim. Proc. Ann., Art. 37.071(b)(2) (see *Jurek v. Texas, supra*, 428 U.S. at 272-73); Utah Code Ann. § 76-5-202(1)(g) (1975 cum. supp.).

¹⁵Code of Ala. Recompiled, tit. 15, 342(9) (1975 interim supp.); Ark. Code § 41-1304 (1975 special supp.); Colo. Rev. Stat. 1973, § 16-11-103(5) (1976 cum. supp.); Conn. Gen. Stat. Ann. § 53a-46a(f) (1976 cum. pocket part); Fla. Stat. Ann. § 921.141(6) (1976 cum. pocket part); Nebr. Rev. Stat. § 29-2523(2) (1975); 49 U.S.C.A. § 1473(c)(6) (1976).

narrowness of Ohio's death sentencing scheme is readily apparent.

For example, all of the statutes cited in notes 12-15, *supra*, either require or at least permit consideration of the defendant's age; indeed, four actually preclude execution of a youth such as petitioner who is under the age of eighteen.¹⁶ All either require or at least permit consideration of a broad range of mental or emotional disturbance or other limitations upon the defendant's capacity to appreciate the wrongfulness of his conduct at the time of the offense, instead of limiting mitigation to an outgoing condition reaching the level of psychosis or retardation.

In the following subsection of this brief, we shall demonstrate that the death penalty imposed on Petitioner is a cruel and unusual punishment because it is grossly disproportioned and excessive in light of all of the facts of his case. Petitioner's death sentence is excessive because it was inflicted upon him for the crime of homicide committed by another person, without any finding that he deliberately intended or actively participated in the victim's death. It is yet more excessive because Petitioner was a 16 year-old, emotionally immature, drug-dependent youth at the time of the offense. But, surely, whether or not the Eighth and Fourteenth Amendments would ever permit the sentence of death to be imposed in a case of this sort, the constitutional requirement of individualized sentencing consideration that this Court has found necessary to assure "reliability in the determination that death is the appropriate punishment in a specific case," *Woodson v. North Carolina, supra*, 428 U.S. at 305, and that sentences of death "accord with 'the dignity of man,'" *Gregg v. Georgia, supra*, 428 U.S. at 173, forbid executing this Petitioner under a death sentence imposed through a procedure that *precluded his sentencer from giving any consideration to any of these factors in the determination of whether he should live or die.*

¹⁶Colo. Rev. Stat. 1973, § 16-11-103(5)(a) (1976 cum. supp.); Conn. Gen. Stat. Ann. § 53a-46a(f)(1) (1976 cum. pocket part); Smith-Hurd Ill. Ann. Stat. c.38 § 9-1(b) (1977 amendment); 49 U.S.C.A. § 1473(c)(6) (1976). To the same effect, see former Cal. Penal Code § 190.3 (1977 cum. pocket part); former N.M. Stat. Ann. § 40A-29-2 (1975 supp.); N.Y. Penal Law § 125.27 (1976 cum. supp.) (mandatory statute still technically in force).

D. IMPOSITION OF THE DEATH PENALTY UPON A 16 YEAR OLD OFFENDER, WHO IS EMOTIONALLY IMMATURE, DISTURBED AND DRUG DEPENDENT, AND WHO HAS NOT BEEN FOUND TO HAVE INTENDED OR PARTICIPATED IN THE HOMICIDAL ACT FOR WHICH HE STANDS CONVICTED IS GROSSLY DISPROPORTIONATE AND OFFENDS THE CONTEMPORARY STANDARDS OF DECENCY EMBODIED IN THE CONSTITUTIONAL PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

For years it has been axiomatic that "punishment for crime should be graduated and proportioned to offense." *Weems v. United States*, 217 U.S. 349, 366-7 (1910). In *Gregg v. Georgia*, *supra.*, this Court held that excessive punishments are unconstitutional where such punishment "(1) makes no reasonable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground." *Coker v. Georgia*, ___ U.S. ___, 97 S. Ct. 2861, 2865 (1977). The Court concluded in *Gregg* that "the death penalty for *deliberate* murder was neither the purposeless imposition of severe punishment nor a punishment grossly disproportionate to the crime," *Id.* [Emphasis added]. *Coker*, on the other hand, held the death penalty excessive for the non-homicidal crime of rape.

This Court's decisions have looked to certain objective indicators in appraising the evolving standards of decency of our society, which speak to the question of excessiveness of the death penalty in particular situations. It has examined, for example, the frequency with which the death penalty was meted out or exacted in fact, the legislative response of the states in enacting new capital punishment statutes after the decision in *Furman*, *supra.* See *Gregg v. Georgia*, *supra.*, *Woodson v. North Carolina*, *supra.*, *Coker v. Georgia*, *supra.*

While it is true that non-triggermen, lookouts, getaway car drivers, etc., have sometimes been sentenced to death,¹⁷ these persons have almost never been actually executed in recent decades. A search of all reported appellate opinions in post-1954 cases of execution for homicide reveals only six cases out of 362 in which clearly identifiable felony murder non-triggermen were executed. The last such execution occurred in 1955, twenty-two years ago.¹⁸ By comparison, there have been 72 executions for rape in this country since 1955.¹⁹ Thus, it is apparent that executions for homicides not clearly committed by the person executed have been a good deal less prevalent in this country than the practice declared unconstitutional in *Coker v. Georgia*, *supra.* Looking as this Court did in *Coker* to "guidance in history and from the objective evidence of the country's present judgment," *Id.* at 4963, one finds that the death penalty for non-triggermen is today virtually extinct.²⁰

¹⁷We are aware of several in our own jurisdiction, Hamilton County, Ohio, both prior to and after the decision in *Furman*. In *State v. Lockett*, 49 Ohio St. 2d 48, and *State v. Bates*, 48 Ohio St. 2d 315, the Ohio Supreme Court affirmed death sentences for offenders who did not participate in the slaying for which they were convicted. These results under the present Ohio statute, however, say nothing about the willingness of sentencers to inflict the death penalty upon non-triggermen, since the statutes themselves forbid consideration of a convicted offender's possible lack of participation by the sentencing authority.

¹⁸This survey was conducted by searching for reported opinions in all post-1954 cases of executions for homicide listed in the inventory in Bowers, *Executions in America* 200-401 (1974). The complete survey, including citation of all 362 cases found, is set forth in Appendix A of this brief.

In addition to six clearly identifiable non-triggermen, the survey found two non-felony murders where the executed person had others commit the homicide for him, and eight other cases where the facts were not reported in sufficient detail to determine whether the executed person was a non-triggerman.

¹⁹UNITED STATES DEPARTMENT OF JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, National Prisoner Statistics Bulletin No. SD-NPS-CP-3, *Capital Punishment 1974* (November 1975) 16-17.

²⁰In Florida, there have been several decisions explicitly rejecting the death penalty in cases of non-triggermen. See *McCaskill v. State*, 344 So. 2d 1276, 1280 (Fla. 1977), and cases cited therein; see also *Slater v. State*, 316 So. 2d 539 (Fla. 1975) and *Taylor v. State*, 294 So. 2d 648 (Fla. 1974).

Examining the actions of state legislatures, it is apparent that Ohio stands alone in its refusal to recognize a minor degree of participation as mitigating. Of the jurisdictions which now have death penalty statutes, five would preclude petitioner's execution,²¹ sixteen others specify that a minor degree of participation be considered²² and the remaining eight allow consideration of any mitigating factor.²³ Not a single state has followed Ohio in excluding minor participation as a mitigating factor.²⁴ Clearly, the evolving standards of decency in this nation as embodied in the Eighth Amendment require that minor participation in the homicidal act be at least considered by the sentencing authority in the capital sentencing process.

²¹Colo. Rev. Stat. 1973 § 16-11-103(5)(d) (1976 cum. supp.); Conn. Gen. Stat. Ann. § 53a-46a(f)(4) (1976 cum. pocket part); Smith-Hurd Ill. Ann. Stat. c.38 § 9-1(b)(6)(a) (1977 amendment); 18 Pa. C.S.A. § § 1102 and 2502 (1977 cum. ann. pocket part) (death penalty precluded for both principals and accomplices in felony murder); 49 U.S.C.A. § 1473(6)(D) (1976).

²²Code of Ala. Recompiled, tit. 15, § 342(9)(d) (1975 interim supp.); Ariz. Rev. Stat. § 13-454(F)(3) (1973 supp. pamphlet); Ark. Code § 41-1304(5) (1975 supp.); Fla. Stat. Ann. § 921.141(6)(d) (1976 cum. pocket part); Burns Ind. Stat. Ann. § 35-50-2-9(c)(4) (1977 amendment); Baldwin's Ky. Rev. Stat. § 532.025(2)(b)(5) (as amended by c. 15 H.B. 14 Ky. Laws of 1976); La. Code Crim. Pro. Ann., Art. 905.5(g) (1977 cum. ann. pocket part); Rev. Stat. Mo. ch. 559, as amended by House Bill No. 90, 79th Gen. Ass. (1st Reg. Sess.), § 5.1(3)(4) (1977); Nebr. Rev. Stat. § 29-2523(2)(e) (1975); Nev. Rev. Stat. ch. 200, as amended by Laws of Nev. ch. 585 § 4.4 (59th Sess., approved May 17, 1977); N.C. Gen. Stat. Art. 100, § 15A-2000(f)(9), as added by Gen. Ass. Ratified Bill ch. 406 (1977); S.C. Code of 1962 § 16-52(C)(v)(4) (1977 amendment); Tenn. Code Ann. § 39-2404(j)(5), as amended by ch. 51 Public Acts, 1977 (enacted April 11, 1977); Utah Code Ann. § 76-3-207(1)(f) (1975 cum. supp.) Wash. Rev. Code Ann. § 9A.32.045(2), as amended by ch. 206, Laws of 1977 (enacted June 10, 1977); Wyo. Stat. § 6-54.2(c), (d) and (j)(iv), as enacted by Enrolled Act No. 42, Senate, 44th Legislature of the State of Wyoming, ch. 112 (1977 Session).

²³See statutes of Delaware, Georgia, Idaho, Mississippi, Montana, Oklahoma, Texas and Virginia cited in notes 12 and 14, *supra*.

²⁴We except from this analysis the mandatory death sentencing statutes of New Hampshire, New York and Rhode Island which, although technically still in force, are of highly doubtful validity in light of this Court's recent decision in *Harry Roberts v. Louisiana*, *supra*, N.H. Rev. Stat. Ann. 1974, § 630.1 (1974); N.Y. Penal Law § 60.06, 125.27 (1976 cum. supp.); R.I. Gen. Laws 1956, § 11-23-2 (1976 supp.)

While the death penalty for deliberate murder is not unconstitutional, *Gregg v. Georgia*, *supra*, we submit that in the case of an accomplice who does not intend, nor participate in, the act of killing, nor even know in advance of the killer's intentions, his participation, such as it is, is not "deliberate murder" within the purview of the *Gregg* series, and is grossly disproportionate to his actual involvement in the offense. The death penalty makes no reasonable contribution to acceptable goals of punishment, *Coker v. Georgia*, *supra*. The culpability of the offender must be considered even where the death penalty is sought to be inflicted for murder, and the offender has not been proved to have been the actual killer nor to have participated in the offense.

While Ohio has not been traditionally a felony murder state, a divided Ohio Supreme Court, in *State v. Lockett*, 49 Ohio St. 2d 48, has decided that an accomplice to a felony may be invested vicariously with the homicidal intent and participation of the principal offender who commits aggravated murder after the felony in which the accomplice was involved has commenced, irrespective of the accomplice's lack of knowledge that murder would be committed, and his lack of approval and participation in the actual killing. Lockett's death sentence was affirmed in that case.

The failure of the Ohio statutory scheme to focus on the presence or lack of homicidal intent, and participation by the accomplice-offender in the killing, by failing to make lack of homicidal intent and participation in the offense a mitigating circumstance rises to a constitutional infirmity in light of the Court's decisions in *Gregg*, affirming the constitutionality of the death penalty in a deliberate murder situation, and in *Coker*, holding that death is grossly out of proportion as a penalty for rape alone. An accomplice in a felony which culminates in a murder he did not intend, approve, or participate in, is not guilty of "deliberate murder" as this Court used that term in *Gregg*; at the most, his intent was to participate in a felony. We do not maintain that a state may not punish an offender more severely when the felony in which he is involved results in the death of an innocent victim; such an offender may properly be convicted of

felony murder if the State chooses to make felony murder without specific homicidal intent on the part of the offender a crime. What we do contend is that the Constitution will not permit the taking of his life by the State where he has not been clearly shown to have intended or participated in the killing of the victim. Such a penalty for such limited participation in a homicide is grossly disproportionate to the offender accomplice's involvement in the killing.

Under the Ohio statutes, the trier of the fact at the penalty trial is precluded from giving any consideration whatsoever to the degree of the offender's participation in the homicidal act nor to his homicidal intent, if any. Therefore, no specific finding of fact as to this important circumstance being required, none is made. In our case, the three-judge trial court simply never focused upon, or resolved, the factual question of the extent of Petitioner's involvement in the events leading to the death of Julius Graber. However, a dispassionate consideration of the record reveals no substantial or credible evidence upon which it can be reliably concluded that Petitioner intended or actively participated in the homicidal act for which he stands condemned to death. A brief summary of the evidence follows:

Other than Petitioner's statement,²⁵ which is exculpatory as to homicidal intent and participation, the evidence concerning Petitioner's involvement is circumstantial, and meager: the existence of his fingerprint on the *outside* glass of Mr. Graber's auto, which is not indicative of participation in any of the events of October 16, 1974, and particularly not indicative of any homicidal intent or participation. See *United States v. Collon*, 426 F.2d 939 (6 Cir. 1972).

The testimony of witness Pierce that he heard two doors slam before the car left the cemetery service drive was offered to

²⁵Both appellate courts below stated that there was nothing to require the trier of the fact to believe any, all or part of Petitioner's statement. With this we must agree. However, we cannot agree with their assumption that to disbelieve a statement of a witness or defendant permits the trier of the fact to conclude that the opposite of that statement has been proved, especially where, as here, it must be proved beyond a reasonable doubt.

combat a straw man the State itself set up: that Petitioner's assertion that he had not left the auto was thereby contradicted. There are two problems with the State's "theory". First, Petitioner never maintained in his statement that he remained inside the auto — only that he did not accompany Hall and Mr. Graber on their fatal walk up the service drive into the dark woods. Secondly, the fact that Pierce heard two doors is not necessarily inconsistent with the theory that Petitioner remained in the auto, as the trunk of the auto would have made similar noises as it opened and closed. What Pierce heard could have been one door and the trunk, as opposed to two doors.

The State, in its opening statement [R. 130] insisted that the glancing face wound received by Mr. Graber was inflicted as he attempted to run from the gun-wielding assailant, and the other defendant then had to run after and subdue Mr. Graber, inflicting bruises on the unfortunate victim's body [A. 130-1]. The State's own witness, Deputy Coroner Jolly, destroyed this theory completely. Because of the narrowness of the face wound and the fact that it was inflicted by a sawed-off shotgun, which spreads its pattern of shot quickly, the coroner testified the victim was only one or two feet from his assailant when the first, wounding, shot was fired, indeed, "within arm's length," [R. 383-4], negating the theory that the first shot was fired as Mr. Graber fled. Further, the coroner could not identify a source or cause of the bruises which appeared on Mr. Graber's body [R. 388]. It would seem as reasonable that the bruises were inflicted while the victim was being jostled around in the trunk of his auto, and especially when it proceeded up the rocky service drive.

The State conceded in final argument that it did not know who pulled the trigger [A. 466-7], although still insisting that the other defendant held the victim down.

We submit that this evidence wholly fails to establish that Petitioner intended, or participated in, Mr. Graber's death. If, as we contend, the Eighth Amendment prohibition of disproportionate and excessive punishment precludes the death penalty for murder where the offender was an accomplice in a murder committed by another person and the offender's participation in

the homicidal act was relatively minor, Petitioner's death sentence cannot constitutionally be affirmed.

Of course, the Court need not reach that question here. For, in addition to the attenuated nature of Petitioner's involvement in the killing of Mr. Graber, other circumstances that are uncontested in this record make the imposition of the death penalty in this case grossly and manifestly excessive. We have detailed those circumstances in Part I(C), *supra*, and we submit, in summary, that death is a disproportioned and constitutionally impermissible penalty for (a) a 16 year old youth, who is (b) emotionally immature and (c) drug dependent, who (d) cooperated fully with the police following his apprehension for (e) accessorial liability in a homicide committed by another person, which he is not found to have intended or actively assisted.

Finally, we challenge the application to this Petitioner of the Ohio death-sentencing process which did not even permit his sentencers to consider Petitioner's relative lack of personal culpability for the killing of Julius Graber by Samuel Hall, or any of the other mitigating circumstances that we have identified above because the narrowness of the statutory mitigating factors actually precluded such consideration. While we maintain that death should be precluded as a penalty for aggravated murder where the offender does not intend nor participate in the death of the victim, the sentencing authority should at the very least be permitted to consider this fact in determining the fate of the accused. As stated previously, Ohio is the only state with the death penalty which precludes consideration of this factor, except a few states with mandatory statutes. Ohio is thus as unique constitutionally as was Georgia in prescribing death as a penalty for rape, *Coker v. Georgia, supra*.

* * * * *

In *Harry Roberts v. Louisiana, supra*, this Court stated that it is constitutionally essential that *whatever* mitigating circumstances are relevant to the offender and the offense must be considered in the decision of whether the offender should be put

to death, 97 S. Ct. 1996. We have demonstrated that of factors which this Court has held to be relevant in that decision, no less than five pertain favorably to Petitioner, and all five are precluded by Ohio law from consideration by the sentencing authority. We have shown further that other mitigating circumstances considered important in capital sentencing in other jurisdictions are similarly unavailable to Petitioner in Ohio, although they also pertain favorably to Petitioner.

The character and record of the offender have no meaningful impact upon the Ohio capital sentencing decision because of the limited and narrow scope of the statutory mitigating circumstances. The very narrowness of those circumstances has resulted in a capital sentencing scheme which is virtually mandatory and which permits no consideration of factors which this Court has held are constitutionally essential in the capital sentencing decision. Such a system offends the Constitution and the death penalty imposed by Ohio upon Petitioner should be vacated.

II.

ADDITIONAL FEATURES OF THE OHIO DEATH-SENTENCING PROCEDURE MAKE IT INADEQUATE TO MEET THE EIGHTH AMENDMENT'S REQUIREMENTS FOR A CONSTITUTIONAL CAPITAL-PUNISHMENT SCHEME, AND TWO OF THESE ADDITIONALLY VIOLATE THE SIXTH AND FOURTEENTH AMENDMENTS.

We have seen that the rigid and mechanical nature of the Ohio death-sentencing procedure, which excludes meaningful consideration of the character or even the degree of culpability of the offender, fails to provide a reliable process for determining the appropriateness of imposing the death penalty in any particular case. Other features of the Ohio procedure compound this vice and render Ohio's system thoroughly incapable of assuring the

Eighth Amendment values will be respected in the process of capital sentencing. The jury is completely barred from participation in that process, with the result that death sentences are meted out unchecked by contemporary community standards of decency. (Subpart II(A) *infra*.) Indeed, capital defendants are needlessly discouraged from asserting their right to jury trial even upon the issues of guilt and degree, in violation of the Sixth and Fourteenth Amendments. (Subpart II(B) *infra*.) The burden of persuading sentencing judges that Ohio's few, narrow mitigating circumstances exist is cast upon the defendant, who must thus bear the risk of error in factfinding with his life at stake. (Subpart II(C) *infra*.) And no adequate appellate review of sentencing is provided which might assure against unreliable, irregular or arbitrary results in the infliction of the extreme penalty. (Subpart II(D) *infra*.)

A. The Ohio statutory scheme for the imposition of the death penalty unconstitutionally denies the accused the right to the judgment of his peers, reflecting contemporary community standards as to the appropriateness of the death penalty in his case.

Under the Ohio statutory scheme for the imposition of capital punishment, the life or death decision of which of the two possible penalties shall be imposed is to be made solely by the trial court. The jury is excluded totally from the sentencing process, §2929.03 (C)(E) R.C. It was not always thus.

The jury has had a role in the Ohio capital sentencing process since 1898,²⁶ continuously until the decision in *Furman v. Georgia*, *supra*, in 1972. At the time *Furman* was announced, the Ohio legislature was devising a new criminal code, which then provided for jury sentencing in capital cases.²⁷ The legislature felt forced to revise the capital punishment statutes to

²⁶Bowers, *Executions in America*, 8 (1974).

²⁷Lehman & Norris, *supra*, 23 Clev. St. L. Rev. 8, 16-17.

conform to what it perceived to be constitutional requirements enunciated by *Furman*, and considering the opinion expressed by this Court in *McGautha v. California*, *supra*, to the effect that it was impossible to formulate standards to guide juries in capital sentencing determinations. The Ohio legislature concluded that to preserve capital punishment in a constitutionally acceptable form, it was necessary to remove the jury totally from the sentencing process.²⁸ History has shown that this conclusion was erroneous.

While this Court has not yet suggested that jury sentencing is required by the Constitution, it has not considered a post-*Furman* death penalty statute, such as Ohio's, which totally excludes the institution of the jury from the sentencing process. While the Florida statute providing that the jury's recommendation is "only" advisory was upheld in *Proffitt v. Florida*, *supra*, the Court cited with approval the position of the Florida Supreme Court that where the trial judge imposes the death penalty over a jury recommendation of life imprisonment, "the facts suggesting a sentence of death should be so clear that no reasonable person could differ," 428 U.S. at 250.

The Ohio Supreme Court has considered the constitutional challenge to the State's juryless sentencing procedure in capital cases, and has rejected the challenge. The Ohio Court cited *Proffitt* and concluded that since this Court has not yet held that a juryless procedure for inflicting the death penalty offends the Constitution, the Ohio procedure must be constitutional, *State v. Weind*, 50 Ohio St.2d 224 at 226. The Ohio Court did not address the absence in Ohio of even an advisory role for the jury as is present under the Florida statutes.

The absence of the jury from any aspect of the Ohio capital sentencing process is unconstitutional on two separate grounds:

(1) *The Sixth and Fourteenth Amendments Require Jury Determination of the Mitigating Facts, the Existence or Non-existence of Which Determines Whether the Accused Shall Live or Die.*

²⁸*Id.*, at 20.

As has been demonstrated, the life or death decision to be made by the sentencing court at an Ohio penalty trial in a capital case depends totally upon the existence or nonexistence of any of three "mitigating" facts. The sentencing process thus involves three factual determinations of the kind that juries historically have made.

It is the requirement of making new factual findings in mitigation which establishes a capital defendant's right to a jury determination of those facts. Where the determination of certain facts is crucial — perhaps "of greater importance than the difference between guilt or innocence for many lesser crimes" — the State may not dilute the standards by which those facts shall be proved merely by "characterizing them as factors that bear solely on punishment," *Mullaney v. Wilbur*, 421 U.S. 684 at 698 (1975).

In *United States v. Kramer*, 289 F.2d 909 (2d Cir. 1961), Judge Friendly wrote for the Court that where an aggravating circumstance is not "an element of the crime but rather a fact going only to the degree of punishment," and where the existence of the aggravating circumstance substantially increases the severity of the punishment," the Sixth Amendment entitles a defendant to have that fact determined by the jury rather than by the sentencing judge," 289 F.2d at 921.

Under the Ohio scheme the aggravating circumstances, proof of any of which will establish the offender's "eligibility" for the death penalty, must be proved by the State beyond a reasonable doubt at the guilt trial, at which the accused is entitled to a jury determination of his guilt and the existence of the aggravating circumstance, absent a valid waiver of his right to a jury trial.²⁹ However, the mitigating facts, more crucial to the accused than the aggravating circumstances, because it is on the presence or

²⁹Had a jury been available at the penalty trial, the Petitioner's decision to waive a jury at the guilt trial would necessarily be based upon different considerations than were present here, see *post* at pp. 48 et seq. and the elements which coerced the waiver of the jury at the guilt trial herein would presumably have been absent.

absence of which that his very life depends, are established at a penalty trial from which Ohio has totally excluded jury participation, even in an advisory capacity.

Yet the mitigating "circumstances" and the aggravating "circumstances" share one essential characteristic: they are *facts*. Aggravation and mitigation are reverse sides of the same coin, the former establishing whether the offense is capital, the latter establishing whether the accused is entitled to avoid the ultimate penalty. The particular mitigating facts established by Ohio, proof of which will preclude the death penalty, have similarities to facts which are frequently raised at criminal trials on the merits as defenses to the charge: inducement by the victim is similar to the defense of consent; duress, coercion and provocation are also available as affirmative defenses on the merits; the existence of the offender's psychosis or mental deficiency as the primary cause of the offense is similar to the defense of insanity.

There is no constitutionally valid reason for the Ohio capital procedures to provide for a jury trial of the existence of aggravating facts and of these defenses to the crime, and to deny at the penalty trial the right to have a jury determine the same kinds of facts, merely because the legislature has designated those facts as "mitigating circumstances." The injustice is compounded by the fact that it is at the nonjury penalty trial that the factual determination involved is literally one of life or death for the accused.

(2) *Ohio's exclusion of the jury from the capital sentencing process unconstitutionally removes the conscience of the community from consideration of whether the death penalty in a given case is consistent with contemporary standards of decency.*

Jury determinations are one of the two "crucial indicators of evolving standards of decency respecting the imposition of punishment in our society," and determining the validity of capital-sentencing statutes involves that contemporary standards of decency be ascertained, *Woodson v. North Carolina, supra*,

428 U.S. at 295. Jury participation in capital sentencing represents "a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). Indeed, "[e]xcept for four States that entirely abolished capital punishment in the middle of the last century, every American jurisdiction has at some time authorized jury sentencing in capital cases," *McGautha v. California*, *supra*, 402 U.S. at 200, n.11.

The evolving standards of decency referred to above resulted, by the middle of this century, in the removal of the "onus of inflicting capital punishment" from the trial judge and had entrusted that life or death decision to the common sense judgment of the jury, *United States v. Jackson*, *supra*, 390 U.S. at 576 n.12. The involvement of the jury in capital sentencing reflected "a reluctance to entrust plenary powers over . . . life [and] death] . . . to one judge or a group of judges," *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). The states that had not abolished capital punishment had come to realize that jury sentencing "places the real direction of society in the hands of the governed . . . and not in . . . the government," Powell, *Jury Trial of Crimes*, 23 Wash. & Lee L. Rev. 1, 5 (1966), citing De Toqueville, *Democracy in America* 282 [Reeve transl. 1948]).

In 1968, this Court, in *Witherspoon v. Illinois*, 391 U.S. 510, 519, n.5, observed that " . . . one of the most important functions any jury can perform . . . is to maintain a link between contemporary community values and the penal system — a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society,' " citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958). See also *Gregg v. Georgia*, *supra*, 428 U.S. at 190.

Ohio, by eliminating the jury from the sentencing process in capital cases, thus has deprived the accused of the benefit of the judgment of the community and has entrusted the life or death decision to agents of the state. The conscience of the community has been removed from the process, as has the right of the offender under the Constitution to have crucial facts determined

by a jury in accordance with the Sixth and Fourteenth Amendments.

Ohio's retreat from jury participation in the capital sentencing process is a hastily-devised, ill-advised attempt, not to formulate a just, constitutional procedure for the imposition of the ultimate punishment on those who deserve it, but an attempt to conform the law to the legislature's mistaken interpretation of the *Furman* decision, with the result here of a death sentence imposed without consideration of factors which the Constitution requires to form a basis for any and every capital sentence. It is tragic that Petitioner and the 75 others on Ohio's death row await death by virtue of a legislative miscalculation that the Constitution requires no jury participation in the capital sentencing procedure. The Constitution does so require, and the death sentence below should be reversed.

B. The Ohio capital punishment procedures unconstitutionally chill the exercise of basic constitutional rights by needlessly encouraging or coercing a defendant charged with capital murder into waiving his Sixth Amendment right to trial by jury and his Fourteenth Amendment right to plead not guilty.³⁰

Once an offender in an Ohio capital case has been found guilty of the offense and a specification of an aggravating circumstance, he must undergo a penalty trial at which he bears the burden of persuading the trier of the fact by a preponderance of the evidence of the existence of any of the statutory mitigating circumstances. The composition of the trier of the fact at the penalty trial is determined by whether or not the defendant waived a jury at the guilt trial. If the guilt trial was to a jury, the trier of the fact at the penalty trial is the single trial judge who

³⁰The grant of certiorari limited the review herein to the first Question of the Petition, which was framed in Eighth Amendment terms. However, this Sixth Amendment question was presented in the Petition as part of the first question, part I-C. See Petition for Cert. p. 21.

presided at the jury trial. If the guilt trial was held to a three judge panel pursuant to waiver of a jury, then the same three judge panel is the trier of the fact at the penalty trial, R.C. 2929.03(C). Petitioner, having waived a jury, was tried both at the guilt trial and the penalty trial by a three judge panel.

A defendant who waives a jury at the guilt trial can receive the death penalty only if the "panel of three judges *unanimously* finds that none of the [three statutory] mitigating circumstances... is established by a preponderance of the evidence." R.C. 2929.03(E). Thus, one who was tried by a jury at the guilt trial must convince the sole trial judge of the existence of a mitigating fact to avoid the death penalty; one who waives a trial by jury need convince only one of the three judges on the panel to avoid the ultimate sanction of death. We know of no other system in Anglo-American jurisprudence where a party can win his case by convincing but one-third of the trier of the fact.

Petitioner asserts that the dread of the death penalty is such that it compels many offenders, and compelled him, into waiving his right to trial by jury, in order to secure a better mathematical chance of avoiding the death penalty in the event of a conviction of the offense and a specification of an aggravating circumstance. The Ohio appellate courts below agreed that a statutory scheme which deliberately or unintentionally chills the right to trial by jury constitutionally cannot be tolerated [A. 135; A. 152]. The Ohio courts, however, disagreed that the Ohio scheme is such a procedure.

Petitioner based his attack below³¹ on the decision of this Court in *United States v. Jackson*, 390 U.S. 570 (1968), in which the Court ruled unconstitutional a federal statute³² which provided that the death penalty for violation of the Federal Kidnapping Act could be imposed only where a jury so recommended. The Court held that the statute needlessly

³¹This facet of the Ohio scheme was attacked in the trial court as well as on appeal [A. 109].

³²18 U.S.C. §1201 (a).

encouraged guilty pleas³³ and jury waivers, in that an accused could guarantee, by pleading guilty or waiving a jury, that he would not be executed if convicted.

Significantly, in *Jackson*, this Court held the statute's unconstitutionality does not depend upon whether it "*coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them." 390 U.S. at 583. As in *Jackson*, the Ohio statute here under attack needlessly penalizes the assertion of a constitutional right.

³³The specific question as to the needless encouragement of guilty pleas was not specifically addressed below in our attack on Ohio's death penalty statutes, as Petitioner did not enter a guilty plea. Under Rule 11(C)(3) of the Ohio Rules of Criminal Procedure, however, a trial judge may, "in the interests of justice" dismiss specifications of aggravating circumstances against capital defendants who plead guilty, thereby avoiding the death penalty. Such a procedure is just as coercive, and merits consideration when determining the constitutionality of the entire Ohio scheme for the imposition of capital punishment. The Ohio Supreme Court has been presented with this challenge and has overruled it, *State v. Weind*, 50 Ohio St.2d 224, at 228 (1977).

Ohio Crim. R. 11(C)(3) provides as follows:

With respect to aggravated murder committed on and after January 1, 1974, the defendant shall plead separately to the charge and to each specification, if any. A plea of guilty or no contest to the charge waives the defendant's right to a jury trial, and before accepting such plea the court shall so advise the defendant and determine that he understands the consequences of such plea.

If the indictment contains no specification, and a plea of guilty or no contest to the charge is accepted, the court shall impose the sentence provided by law.

If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice.

If the indictment contains one or more specifications which are not dismissed upon acceptance of a plea of guilty or no contest to the charge, or if pleas of guilty or no contest to both the charge and one or more specifications are accepted, a court composed of three judges shall: (a) determine whether the offense was aggravated murder or a lesser offense; and (b) if the offense is determined to have been aggravated murder, proceed as provided by law to determine the presence or absence of the specified aggravating circumstances and of mitigating circumstances, and impose sentence accordingly.

The Ohio Supreme Court distinguished our situation from *Jackson* in that in *Jackson*, the accused could guarantee avoidance of the death penalty by waiving a jury trial, whereas under the Ohio plan, the death penalty is possible under either alternative, and may be avoided under either. "[T]hus, we are confronted with only the arguably greater possibility of the avoidance of the death penalty by the requirement of unanimity within the [three-judge] panel, and not with its absolute avoidance as in *Jackson*," 48 Ohio St. 2d at 275. That Court further equated the situation with that faced in deciding whether to have a jury determine the issue of guilt or innocence, citing the greater possibility of convincing one of twelve jurors of innocence than of convincing one of the three judges of the presence of a mitigating fact.

That the possibility of avoidance of the death penalty is greater where that decision must be made unanimously by three judges is not merely "arguable." In *Rainsberger v. Fogliani*, 380 F.2d 783 (9th Cir. 1967), a defendant in a capital case attacked a Nevada statute which provided for a unanimous decision by a three judge panel before the death penalty could be imposed, claiming that he "stood a better chance of avoiding the death penalty before a single judge than before a panel of three." 380 F.2d at 783. The Ninth Circuit held:

We cannot agree [with appellant]. A multi-judge court offers an opportunity for disagreement wholly lacking with a single judge. With such an issue as the death penalty involved, the possibility and availability of disagreement are *advantages which cannot be disregarded*. [Emphasis added]

380 F.2d at 783. We submit that the same advantages inure to Ohio capital defendants, and many of them, Petitioner included, do not disregard those advantages, waiving their right to a jury trial in order to secure that mathematical advantage.³⁴

³⁴In our case, for example, it would have been preferable to argue the issue of the culpability of this defendant who did not know in advance of the homicidal intent of the codefendant, nor participate in the actual slaying, to a jury, in the hope of reducing the offense to murder or manslaughter. However, it was felt that the three judge panel would offer a better chance of surviving the sentencing process if Petitioner has been convicted. The lesser offense was, however, argued to the three judge panel [R. 472 et seq.].

The Ohio Supreme Court's "analogy" that it is more difficult to convince one of three judges of mitigation than to convince one of twelve jurors of innocence is not analogous — by convincing one juror, the accused has not won anything — he has a jury "hung" at 11-1 for conviction; however, by convincing one of the three penalty trial judges when a trial jury has been waived, the offender *has* won — he has avoided the death penalty. Thus, the Ohio court's equation of the two situations is erroneous.

Further, the decision of whether or not to waive a jury is not made in a vacuum. In some cases, where there is a strong factual defense, of self-defense or alibi, there would be less compulsion or needless encouragement to waive a jury. But where, as here, there is no such defense; where an extremely damaging statement has been given and the motion to suppress the statement has been denied; and where pretrial psychiatric reports indicate that an insanity defense will not prevail, the imminence of probable conviction of the offense and the specification renders the specter of the death penalty all too real, then the Ohio statutory scheme with its built-in mathematical advantage to a defendant who waives a jury trial, coerces, or at least needlessly encourages, the waiver of the right to a jury trial.

It is not enough to cavalierly dismiss the choice as one similar to those made by defendants and their counsel in all criminal cases. In our situation, certain aspects of the case which might require a jury trial ordinarily are not worth the risk in a capital case of increasing the mathematical chance of a death sentence. While any criminal defendant has many choices to make, including whether or not to waive a jury, that choice should not be "loaded" one way or another in a capital case by procedural provisions such as are present here. The due process clause does not, we submit, require a capital defendant to make such a "Hobson's choice."

C. The Eighth Amendment and the Due Process Clause of the Fourteenth Amendment preclude the states from placing on a capital defendant the burden of proving that he should be spared, and from executing an offender when, from the evidence of mitigation, it is as likely as not that he should live.

In our Petition, we assailed the capital sentencing process of Ohio for placing the burden of proof on the accused to prove the existence of a mitigating fact by a preponderance of the evidence. The basis of that contention was this Court's holding in *Mullaney v. Wilbur*, *supra*. However, two cases decided since the filing of our Petition require a shift of emphasis.

In a non-capital case, *Patterson v. New York*, ___ U.S. ___, 97 S. Ct. 2319 (1977), this Court held that a State may indeed place the burden of establishing sentence-mitigating factors (there, affirmative defenses) on criminal defendants, as long as the defendant does not have to negate an element of the offense, and as long as it is still the burden of the State to prove all elements of the offense beyond a reasonable doubt. We submit that, if *Patterson* also applies to capital cases, Petitioner's attack is still meritorious.

In the other case, an Ohio capital case, *State v. Downs*, 51 Ohio St.2d at 47 (1977), the Ohio Supreme Court discussed the phrase "burden of proof" in the two senses in which the Ohio Court feels it applies: (1) the burden of going forward, or, of initial production of the evidence, and (2) the burden of persuasion, or, "the risk of non-persuasion." That Court held that in the penalty trial a capital offender does not bear the "burden of proof" in the context that the phrase is used in a trial, that is, the burden of initial production, but that he does bear the burden of proof in the sense that he bears the risk of non-persuasion, 51 Ohio St.2d at 55. The latter burden is stated as follows: "it is apparent from the statute that if the evidence is in equilibrium, the risk of non-persuasion falls upon the defendant." *Id.* The

Ohio Court then held that the statute does not violate due process.³⁵

The decision of the Ohio Supreme Court in *Downs* does not change the proof requirements in any real sense. The distinctions between "burden of proof", "burden of going forward", and "risk of non-persuasion" are, in the capital sentencing context under Ohio's statutes, distinctions of semantics rather than of substance. The reason is that one who bears the risk of non-persuasion in an Ohio capital mitigation hearing has a very real burden indeed, as he stands to lose his life *even where it is as likely as not that the life-saving mitigating fact exists*. While it is undoubtedly true that the Court, in Ohio, has the burden of initial production [the psychiatric and presentence reports], and that the defendant may choose to stand on those reports, with the result that he may be spared without producing any evidence [as, for example, where the psychiatric report concludes that the offender's psychosis is the primary cause of the offense], the fact that he has the risk of non-persuasion if the evidence is in equipoise will compel him to produce all evidence which he can muster to avoid the ultimate penalty. Thus, the interpretation of the phrase "burden of proof" in the Ohio capital sentencing context means little considering the practical problems confronting an offender at a penalty trial, particularly where the reports do not clearly establish the presence of a mitigating

³⁵The Ohio Supreme Court in *Downs* ruled that "neither the defendant nor the prosecution is required by statute to offer testimony or other evidence of mitigating circumstances," *Id.* at 53, and that "In a mitigation hearing the defendant does not bear the burden of initial production, . . . the court has the initial responsibility to require that certain evidence be collected and certain examinations are made [Referring to the presentence investigation of the offender and the post-conviction psychiatric evaluation]." *Id.*, at 55. The court disapproved specifically language in *State v. Woods*, *supra*, and *State v. Lockett*, 49 Ohio St.2d 48, to the effect that the defendant has a burden of proof to establish a mitigating circumstance by a preponderance. The Court nonetheless affirmed the death sentences of *Woods*, *Downs* and *Lockett*, claiming that its examination of the record in those cases revealed that since no actual burden was imposed upon the defendants, the language stricken was dicta.

circumstance. He will have the burden, whether it is characterized as the burden of production or the "risk of non-persuasion."³⁶

We respectfully submit that *Patterson* does not stand for the proposition that Ohio may place the burden of proof of a mitigating circumstance on capital defendants, and that the decision in *Downs* placing the risk of non-persuasion on the defendant where the evidence is in equipoise is not constitutional.

The reason that neither *Patterson* nor *Downs* is dispositive of this issue is that where a defendant's very life depends upon whether a certain fact exists, there is an intolerable possibility of avoidable error in the determination of the non-existence of the mitigating fact if the defendant dies when the proof is in equipoise.

³⁶In our Petition, we complained of the colloquy at the outset of the penalty trial where one of the judges stated that the defendant had the burden of proof of a mitigating circumstance to a preponderance, another judge agreed, and the first stated "and the defendant goes first." [A. 70]. It is urged that this statement placed the "burden" on Petitioner, in whatever sense of that word. However, we must acknowledge that at the time the colloquy occurred, the court had already met what the Ohio Supreme Court stated in *Downs* was the trial court's burden of initial production by obtaining the reports [A. 68], and Petitioner had already informed the court that he was not standing on the reports [A. 70]. The trial court also had been informed that seven witnesses had been subpoenaed, and those witnesses were in the courtroom at the time of the colloquy. Finally, the oral and written findings [A. 129, A. 20] of the trial court did not state that Petitioner had failed to meet any burden of proof, but only that upon consideration of all factors required by the statute, none of the mitigating factors had been proved to a preponderance. The Ohio Supreme Court, in its review of the penalty trial also made no mention of a failure to sustain a burden of proof, holding only that no mitigating circumstance was established to a preponderance. If, however, Petitioner is entitled to relief because of the statement of the trial court, since the Ohio Supreme Court has held that failure to raise the *Mullaney*-type burden of proof argument in the Court of Appeals (as occurred here) will preclude further review on that issue, *State v. Williams*, 51 Ohio St.2d 112 (1977), and since neither this Court nor the Ohio Supreme Court can ascertain from the record the sense in which the trial court used the phrase burden of proof, *Gardner v. Florida*, ___ U.S. at ___, 97 S. Ct. at 1207, requires that the matter be remanded to the trial court for a new penalty trial.

This Court has recognized a qualitative difference between the death sentence and a sentence of imprisonment:

... the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, supra, 428 U.S. at 305.

In *Mullaney v. Wilbur*, supra, the Court found it "intolerable" to impose a more severe sentence on the defendant "... when the evidence indicates *it is as likely as not* that he deserves a significantly lesser sentence." 421 U.S. at 703. Neither *Mullaney* nor *Patterson* involved capital cases. In our case, the difference is not merely of years, as in those cases, but of life and death.

Historically, the means for preventing avoidable error in criminal prosecutions has been requiring the prosecution to prove each and every fact necessary for conviction beyond a reasonable doubt, *Speiser v. Randall*, 357 U.S. 513, 525-6 (1958). The reasonable doubt requirement is guaranteed by the due process clause of the Fourteenth Amendment, *In re Winship*, 397 U.S. 358, 363 (1970).

While *Patterson* recognized that the State may impose upon a criminal defendant the burden of establishing an affirmative defense in a noncapital case, we submit that the Constitution requires a different standard in death cases. This Court has held that the sentencing process in such cases must satisfy the requirements of the due process clause, and any avoidable error in the process of imposing a sentence of death is intolerable, *Gardner v. Florida*, ___ U.S. ___, 97 S. Ct. 1197, at 1205, (1977).

Thus, both Eighth and Fourteenth Amendment requirements must be met in a capital case, in assigning burden and degree of proof.

We respectfully submit that in capital cases, where the difference in possible sentences is qualitative, rather than of degree, the Constitution requires that the prosecution bear the burden of proving every fact necessary to the imposition of that penalty beyond a reasonable doubt. Only in this manner can it be assured as certainly as is humanly possible that no avoidable error can infect the process by which a citizen is selected for the ultimate punishment of death.

Under the Ohio statutes, where the offender will suffer death even where the evidence indicates that it is as likely as not that he should live, it is simply not enough to assert, as did the Ohio Supreme Court, that the defendant has no burden of proof, but merely shoulders the risk of non-persuasion. *See* note 35 *supra*. Under the Ohio statutes, there is no practical meaning to this distinction since the offender will die if mitigation is not proved; thus, it is *his* burden to bring forth whatever evidence he can to forestall the possibility of the death sentence.

What is required, we submit, is that the non-existence of the statutory mitigating factors must be proved beyond a reasonable doubt by the prosecution. Anything less, in a capital case, is an intolerable gamble that one will be put to death without the presence of avoidable error in the proceedings in which the ultimate decision was made. If the guilt of the offender, without which he could not be "eligible" for the death penalty must be sufficiently certain as to require proof beyond a reasonable doubt, certainly the absence of mitigating circumstances which will assure his death, must be proved by the same degree of proof, and the party with that burden should be the party which seeks the ultimate penalty, the State.

Ruling as we urge herein will place no great burden on the State. The statutory mitigating circumstances have their counterparts in typical defenses to guilt, as we have demonstrated, *ante*, p. 20. The State is on notice via the statute itself as to what those circumstances are. It would be no more difficult for the State to prove the non-existence of mitigating circumstances in a capital case, than it would be to prepare rebuttal for the defenses to the crime itself which have their counterparts in the

Ohio mitigating circumstances. To require the State of Ohio to prove the absence of mitigating circumstances would not be too cumbersome, expensive or inaccurate, *Patterson, supra*, 97 S. Ct. at 2326, particularly in a capital case where the burden on the State would be more than counterbalanced by the assurance that the factual determination on which the Ohio capital sentencing process rests is as free as is possible of the possibility of avoidable error.

There is yet another aspect to the due process considerations at the penalty trial. We have demonstrated that *Downs* does not actually change the proof requirements at the Ohio penalty trial stage; yet the decision in that case was described by Judge Celebrezze, concurring, as "further compound[ing] the confusion engendered by the much misunderstood decision in *Mullaney v. Wilbur* (citation omitted)." 51 Ohio St.2d at 66. We have also demonstrated the changing definition of mental deficiency as that term is used in the Ohio statutes, *ante* at 20-23.

Where, as this Court has indicated, any avoidable error in the process of imposing a death sentence is intolerable, *Gardner v. Florida, supra*, the process in Ohio has suffered from the frequently changing and confusing opinions of the Ohio Supreme Court on substantive and procedural matters. For almost two years, from January 1, 1974 when the new capital statutes became effective, until the decision in *State v. Bayless, supra*, in late November of 1976, the trial courts of Ohio had no guidance from the only appellate court with state-wide jurisdiction as to important procedural and substantive matters as the definition of mitigating circumstances and the procedures by which Ohio's offenders were sentenced to live or die. The definition of mental deficiency seemed to change, for a while, with every decision. The Ohio Supreme Court said in *Woods* that the defendant has the burden of proof of a mitigating circumstance, and seven months later, in *Downs* said that he does not. But what of the offenders whose penalty trials were held in between? While the burdens were not meaningfully changed, by what standards in the individual penalty trials were the respective sentences determined? The only consistency in all of the decisions of the Ohio

Supreme Court in its death penalty cases is that *every* death sentence it has reviewed has been affirmed where the conviction was not reversed on other grounds, and that occurred in only one case.

Thus, the definitional and procedural morass generated by the decisions of the Ohio Supreme Court has created a situation in which the trial courts cannot possibly ascertain which standards to apply, whether in defining the only offender-related mitigating circumstance, mental deficiency, or in determining the burdens borne by the parties in the penalty trial. This situation itself makes it impossible to avoid "avoidable" error in the sentencing process and is a violation of due process under *Gardner v. Florida*.

D. The Ohio procedure for implementation of the death penalty provides no meaningful appellate review of the appropriateness of the death sentence.

One of the salutary features of the Georgia death penalty statutes cited by the Court in *Gregg v. Georgia, supra*, is the use of the appellate process on a state-wide basis to review each death sentence vis-a-vis other death sentences so that in cases where the ultimate sanction of death is imposed, its imposition is not disproportionately severe compared with other death sentences imposed throughout the jurisdiction. Such appellate review mitigates against the arbitrary and capricious imposition of the death penalty. The Georgia plan requires each trial judge in a capital case to complete a questionnaire regarding the relevant circumstances of the case so that the state supreme court has a meaningful basis on which to compare death sentences imposed throughout the state.

This Court has also approved the appellate review of capital sentences as practiced in the State of Florida, where review of that state's capital sentences by the state's highest court resulted in the reduction of the death penalty to life imprisonment in 8 of 21 cases, *Proffitt v. Florida, supra*.

Under Ohio law and practice however, there is no meaningful appellate review on a state-wide basis of the appropriateness of each death sentence, either individually, or on a case-by-case comparison. By contrast with the Florida experience, the Ohio Supreme Court to date has reviewed 26 cases in which the death penalty was imposed. The death sentence was upheld in 25, and the 26th case was reversed for a new trial on grounds not related to the penalty or the manner of its imposition.³⁷ Thus, in *every* capital case in which it has upheld the conviction, the Ohio Supreme Court has affirmed the death sentence.³⁸

In Ohio, appellate courts have never reviewed the appropriateness of the sentence in a criminal case as long as the sentence imposed was within the limitations prescribed by statute, *City of Toledo v. Reasonover*, 5 Ohio St.2d 22, 213 N.E.2d 179. One frequently cited Ohio authority, Ohio Jurisprudence 2d, goes further and states that in Ohio *appellate courts do not have jurisdiction* to review sentences which are within the statutory parameters, 4 O Jur.2d, *Appellate Review*, §1159. In a pre-*Furman* case, this Court recognized that Ohio law prohibited reduction of a jury's death sentence by either the trial or an appellate court, *McGautha v. California, supra*, and *Crampton v. Ohio*, 402 U.S. 183, 195 n.7 (1971). The death sentence as imposed by a three judge panel prior to *Furman* was also not reviewable, *State v. Stewart*, 176 Ohio St. 156, 198 N.E.2d 439 (1964) and *State v. Ferguson*, 175 Ohio St. 390, 195 N.E.2d 794 (1964).

In its first decision in a case where a capital sentence was imposed under the new statutory scheme here under attack, *State v. Bayless, supra*, 48 Ohio St.2d at 86, the Ohio Supreme Court promised that it would "independently review the aggravating and mitigating circumstances presented by the facts of each case to assure ourselves that capital sentences are fairly imposed by

³⁷*State v. Lockett*, 49 Ohio St.2d 71 (1976).

³⁸A complete list of the names and citations of all Ohio Supreme Court opinions in capital cases under the new statutes is annexed hereto as Appendix B.

Ohio's trial judges." However, examination of the Ohio Supreme Court's opinions in the 26 capital cases reviewed since *Bayless* indicates that no comparison of any death sentence imposed with any other as is done in Georgia, has even been attempted by the Ohio Supreme Court, and its scrutiny of the facts of the individual cases before it is inadequate to assure reliable, non-arbitrary sentencing decisions at the trial level.³⁹

The failure of the Ohio Supreme Court to give adequate review for Eighth Amendment purposes of its capital sentences stems from the long-standing Ohio doctrine that appellate courts are not free to disturb findings of fact made by a trial court, *Feterle v. Huettner*, 28 Ohio St.2d 54, 275 N.E.2d 340 (1971), *Gillen-Crow Pharmacies, Inc. v. Mandzak*, 5 Ohio St.2d 201, 215 N.E.2d 377 (1966).

The Ohio Supreme Court has stated bluntly in a capital case that the mitigating circumstances are facts, and that "... in criminal appeals this court *will not retry issues of fact* [relating to mitigation]. In the circumstances at hand, we *confine our consideration* to a determination of whether there is sufficient substantial evidence to support the verdict rendered," *State v. Edwards*, 49 Ohio St.2d 31, 47, 358 N.E.2d 1051 at 1062 [Emphasis added].

Petitioner respectfully suggests that review of a capital sentence is not a situation in which a state's highest court should "confine its consideration" in *any* respect. Further, the "substantial evidence" test to which the Ohio court referred was cited in *Edwards, supra*, as being the same as the test set forth in *State v. Cliff*, 19 Ohio St.2d 31, 249 N.E.2d 823 (1960), a pre-*Furman* capital case. That test is so narrow as to be totally

³⁹In one case, *State v. Woods, supra*, 357 N.E.2d at 1064, n.2, the Ohio Supreme Court complained that the presentence report required by statute was not in the record before it; citing its "special responsibility in capital cases to assure that the ultimate penalty of death be imposed fairly and consistently," that Court stated that such reports were "properly" to be included in the record before it. It then affirmed Woods' death sentence without, apparently, having reviewed that report. Such a practice is questionable in light of *Gardner v. Florida, supra*.

useless in assuring that Ohio's death sentences are consistently and fairly applied, for the test is that the death sentence will be upheld *unless no reasonable mind could reach the same conclusion!*

The Ohio Supreme Court is also limited in its consideration by the fact that the mitigating circumstances are those which will probably require testimony to establish, particularly with respect to the only offender-oriented mitigation, that of the presence of psychosis or mental deficiency as a primary cause of the offense. This being the case, the credibility of the witness becomes of great significance; however, the Ohio Supreme Court will not assess the credibility of witnesses upon review. *State v. Antill*, 176 Ohio St. 61, 197 N.E.2d 548 (1964).

The rigid adherence by the Ohio Supreme Court to the doctrine that it will not retry the existence of the mitigating facts nor reverse the finding by trial courts as to those facts unless no reasonable person could agree, and to the doctrine that the credibility of witnesses, including those called to testify at the penalty trial, is exclusively for the trier of the fact, assures that no meaningful appellate review of capital sentences on a case-by-case basis at the state-wide level is possible. That *every* death sentence reviewed by the Ohio Supreme Court (25 at the date of this writing) has been upheld where the conviction upon which it is based is affirmed, indicates that there is no meaningful review, and as a result, the narrow and rigid strictures limiting the trier of the fact at the penalty trial level are not subject to correction at the appellate level.

If there were some discretion in the Ohio capital sentencing process at some point in that process, factors which this Court has held to be important and constitutionally required as part of the procedure for imposing the death penalty might have a meaningful impact on the capital decision. As the trial courts are precluded from considering the character and record of the offender as a determinative factor in the life or death decision of sentencing in a capital case, the Ohio appellate courts, including the Ohio Supreme Court, are without the authority or inclination to consider such factors in reviewing the appropriateness of the

sentences in capital cases. Such a system offends the Eighth and Fourteenth Amendments to the Constitution of the United States and cannot be permitted to continue.

CONCLUSION

For the above reasons, it is manifest that the capital sentence imposed on Petitioner was imposed by the State of Ohio in violation of the constitutional proscription against cruel and unusual punishment, and in violation of his right to due process of law and to trial by jury under the Sixth and Fourteenth Amendments. The judgment of the Ohio Supreme Court should be reversed.

Respectfully submitted,

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APPENDIX A

Methodological Note:

This survey was conducted by searching for reported appellate opinions in all post-1954 cases of execution for homicide listed in the inventory in Bowers, *Executions in America* 201-400 (1974).

Reported decisions were found for 360 such cases. In two additional cases—Jose Luis Monge (Colorado) and Gary Gilmore (Utah) — there was no appeal but the facts have been widely reported.

Findings:

Of the 362 cases listed, it is clear in 346 that the individual executed for homicide personally committed a homicidal assault. In two the person executed had others commit a homicide for him. In eight other cases the facts were not reported in sufficient detail to determine whether the person executed was a non-triggerman.

The survey uncovered only six cases in which clearly identifiable non-triggermen were executed: Two in New York, two in New Jersey, one in Florida, and one in Tennessee. All six were executed in 1955.

ALABAMA

1. *Bowen v. State*, 274 Ala. 66, 145 So. 2d 421 (1962)
2. *Gosa v. State*, 273 Ala. 346, 139 So. 2d 326 (1962)
3. *Johnson v. State*, 272 Ala. 633, 133 So. 2d 53 (1961)
4. *Boggs v. State*, 270 Ala. 209, 116 So. 2d 903 (1959)
5. *Dockery v. State*, 269 Ala. 564, 114 So. 2d 294 (1959)
6. *Martin v. State*, 266 Ala. 290, 96 So. 2d 298 (1957)
7. *Johnson v. State*, 265 Ala. 360, 91 So. 2d 476 (1956)

ARIZONA

8. *McGee v. Arizona State Board of Pardons & Parole*, 92 Ariz. 317, 376 P.2d 779 (1962)
9. *State v. Silvas*, 91 Ariz. 386, 372 P.2d 718 (1962)
10. *State v. Robinson*, 89 Ariz. 224, 360 P.2d 474 (1961)
11. *State v. Fenton*, 86 Ariz. 111, 341 P.2d 237 (1959)
12. *State v. Craft*, 85 Ariz. 143, 333 P.2d 728 (1958)
13. *State v. Jordan*, 83 Ariz. 248, 320 P.2d 446 (1958)
14. *State v. Coey*, 82 Ariz. 133, 309 P.2d 260 (1957)
15. *State v. Thomas*, 79 Ariz. 158, 285 P.2d 612 (1955)
16. *State v. Folk*, 78 Ariz. 205, 277 P.2d 1016 (1954)

ARKANSAS

17. *Moore v. State*, 231 Ark. 672, 331 S.W.2d 841 (1960)
18. *Bracey v. State*, 231 Ark. 647, 331 S.W.2d 870 (1960)
19. *Nail v. State*, 231 Ark. 70, 328 S.W.2d 836 (1959)
20. *Legett v. State*, 227 Ark. 393, 299 S.W.2d 59 (1959)
21. *Young v. State*, 230 Ark. 737, 324 S.W.2d 524 (1959)
22. *Hays v. State*, 230 Ark. 731, 324 S.W.2d 520 (1959)
23. *House v. State*, 230 Ark. 622, 324 S.W.2d 112 (1959)
24. *Walker v. State*, 229 Ark. 685, 317 S.W.2d 823 (1958)
25. *Lee v. State*, 229 Ark. 354, 315 S.W.2d 916 (1958)
26. *Moore v. State*, 227 Ark. 544, 299 S.W.2d 838 (1957)
27. *Boyde v. State*, 227 Ark. 544, 299 S.W.2d 838 (1957)
28. *Boone v. State*, 227 Ark. 544, 299 S.W.2d 838 (1957)
29. *Byrd v. State*, 227 Ark. 544, 299 S.W.2d 838 (1957)
30. *Smith v. State*, 227 Ark. 332, 299 S.W.2d 52 (1957)
31. *Jenkins v. State*, 222 Ark. 511, 261 S.W.2d 784 (1953)

CALIFORNIA

32. *People v. Mitchell*, 48 Cal. Rptr. 371 (1966)
33. *People v. Bentley*, 58 Cal. 2d 858 (1962)
34. *People v. Darling*, 58 Cal. 2d 15 (1962)
35. *People v. Ditson*, 57 Cal. 2d 415 (1962)
36. *People v. Garner*, 57 Cal. 2d 135 (1961)
37. *People v. Hughes*, 57 Cal. 2d 89 (1961)
38. *People v. Lane*, 56 Cal. 2d 868 (1961)
39. *People v. Carter*, 56 Cal. 2d 549 (1961)
40. *People v. Gonzalez*, 56 Cal. 2d 371 (1961)
41. *People v. Lindsey*, 56 Cal. 2d 324 (1961)
42. *People v. Combes*, 56 Cal. 2d 135 (1961)
43. *People v. Kendrick*, 56 Cal. 2d 71 (1961)
44. *People v. Rittger*, 55 Cal. 2d 849 (1961)
45. *People v. Robillard*, 55 Cal. 2d 88 (1960)
46. *People v. Baldonado*, 53 Cal. 2d 824 (1960)
47. *People v. Moya*, 53 Cal. 2d 819 (1960)
48. *People v. Duncan*, 53 Cal. 2d 803 (1960)¹
49. *People v. Cartier*, 54 Cal. 2d 300 (1960)
50. *People v. Cooper*, 53 Cal. 2d 755 (1960)
51. *People v. Scott*, 53 Cal. 2d 558 (1960)
52. *People v. Wade*, 53 Cal. 2d 322 (1959)
53. *People v. Hooten*, 53 Cal. 2d 85 (1959)
54. *People v. Hamilton*, 52 Cal. 2d 636 (1959)
55. *People v. Jones*, 52 Cal. 2d 636 (1959)
56. *People v. Glatman*, 52 Cal. 2d 283 (1959)
57. *People v. Nash*, 52 Cal. 2d 36 (1959)
58. *People v. Linden*, 52 Cal. 2d 1 (1959)
59. *People v. Duncan*, 51 Cal. 2d 523 (1958)
60. *People v. Feldkamp*, 51 Cal. 2d 237 (1958)
61. *People v. Ward*, 50 Cal. 2d 702 (1958)
62. *People v. Bashor*, 48 Cal. 2d 763 (1957)
63. *People v. Dement*, 48 Cal. 2d 600 (1957)
64. *People v. Tipton*, 48 Cal. 2d 389 (1957)
65. *People v. Hardenbrook*, 48 Cal. 2d 345 (1957)

¹Murder for hire.

66. *People v. Cheary*, 48 Cal. 2d 301 (1957)
67. *People v. Johnston*, 48 Cal. 2d 78 (1957)
68. *People v. Riser*, 47 Cal. 2d 566 (1956)
69. *People v. Abbott*, 47 Cal. 2d 363 (1956)
70. *People v. Reese*, 47 Cal. 2d 112 (1956)
71. *People v. Morlock*, 46 Cal. 2d 141 (1956)
72. *People v. Caritativo*, 46 Cal. 2d 68 (1956)
73. *People v. Jordan*, 45 Cal. 2d 697 (1955)
74. *People v. Pierce*, 45 Cal. 2d 697 (1955)
75. *People v. Thomas*, 45 Cal. 2d 433 (1955)
76. *People v. Berry*, 44 Cal. 2d 426 (1955)
77. *People v. Cavanaugh*, 44 Cal. 2d at 252 (1955)
78. *People v. Zilbauer*, 44 Cal. 2d 43 (1955)
79. *People v. Barwell*, 44 Cal. 2d 16 (1955)
80. *People v. Caldwell*, 43 Cal. 2d 864 (1955)
81. *People v. Simpson*, 43 Cal. 2d 553 (1954)²
82. *People v. Graham*, 43 Cal. 2d 319 (1954)
83. *People v. Santo*, 43 Cal. 2d 319 (1954)
84. *People v. Baldwin*, 42 Cal. 2d 858 (1954)
85. *People v. Byrd*, 42 Cal. 2d 200 (1954)
86. *People v. Rupp*, 41 Cal. 2d 371 (1953)

COLORADO

87. *People v. Monge*, Executed June 7, 1967 (Did not appeal, but is reliably reported to have personally committed the homicide for which he was executed. See Burton, Pileup on Death Row 68-69 (1963))
88. *People v. Bizup*, 150 Colo. 5 (1962)
89. *People v. Hammile*, 145 Colo. 577 (1961)
90. *People v. Wooley*, 145 Colo. 577 (1961)
91. *People v. Early*, 142 Colo. 462 (1960)
92. *People v. Leick*, 140 Colo. 564 (1959)
93. *People v. Gilbert*, 134 Colo. 290 (1956)
94. *People v. Martinez*, 134 Colo. 82 (1956)

²Father had his children murder his wife.

CONNECTICUT

95. *State v. Davies*, 146 Conn. 137 (1959)
96. *State v. Wojculewicz*, 142 Conn. 676 (1955)
97. *State v. Taborsky*, 142 Conn. 619 (1955)
98. *State v. Maim*, 142 Conn. 113 (1955)
99. *State v. Lorain*, 141 Conn. 694 (1954)
100. *State v. Donahue*, 141 Conn. 656 (1954)

DISTRICT OF COLUMBIA

101. *Carter v. United States*, 96 U.S. App. D.C. 40 (1956)

FLORIDA

102. *Blake v. State*, 156 So. 2d 511 (Fla. 1964)
103. *Dawson v. State*, 154 So. 2d 318 (Fla. 1964)
104. *Lee v. State*, 141 So. 2d 257 (Fla. 1963)
105. *Leach v. State*, 136 So. 2d 329 (Fla. 1961)
106. *Hill v. State*, 133 So. 2d 68 (Fla. 1961)
107. *Johnson v. State*, 130 So. 2d 599 (Fla. 1961)
108. *Jefferson v. State*, 128 So. 2d 132 (Fla. 1961)
109. *Brooks v. State*, 117 So. 482 (Fla. 1960)
110. *Mackiewicz v. State*, 114 So. 2d 684 (Fla. 1959)
111. *Daniels v. State*, 108 So. 2d 755 (Fla. 1959)
112. *Frazier v. State*, 107 So. 2d 16 (Fla. 1958)
113. *Wither v. State*, 104 So. 2d 725 (Fla. 1958)
114. *Nelson v. State*, 97 So. 2d 250 (Fla. 1957)
115. *Everett v. State*, 97 So. 2d 241 (Fla. 1957)
116. *Long v. State*, 96 So. 2d 897 (Fla. 1957)
117. *Raulerson v. State*, 93 So. 2d 399 (Fla. 1957)
118. *Rhone v. State*, 93 So. 2d 80 (Fla. 1957)
119. *Ezzell v. State*, 88 So. 2d 280 (Fla. 1956)
120. *LaVoie v. State*, 84 So. 2d 593 (Fla. 1956)
121. *Barwicks v. State*, 82 So. 2d 356 (Fla. 1955)
122. *Ambrister v. State*, 78 So. 2d 876 (Fla. 1955)
123. *Anderson v. State*, 78 So. 2d 876 (Fla. 1955)
124. *Dyer v. State*, 78 So. 2d 402 (Fla. 1955)
125. *Hornbeck v. State*, 77 So. 2d 876 (Fla. 1955)³
126. *Gillard v. State*, 73 So. 2d 677 (Fla. 1954)

³Non-triggerman in felony murder.

GEORGIA

127. *Jones v. State*, 219 Ga. 245 (1963)
128. *Pugh v. State*, 219 Ga. 166 (1963)
129. *Chandler v. State*, 219 Ga. 105 (1963)
130. *Dye v. State*, 218 Ga. 330 (1962)
131. *Smith v. State*, 218 Ga. 216 (1962)
132. *Wimis v. State*, 216 Ga. 350 (1960)
133. *Mullins v. State*, 216 Ga. 183 (1960)
134. *Davis v. State*, 215 Ga. 788 (1960)
135. *Albert v. State*, 215 Ga. 564 (1959)
136. *Johnson v. State*, 215 Ga. 448 (1959)
137. *Wilson v. State*, 215 Ga. 446 (1959)
138. *Bunkley v. State*, 215 Ga. 377 (1959)
139. *Wilson v. State*, 215 Ga. 282 (1960)
140. *Hill v. State*, 214 Ga. 794 (1959)
141. *Charlton v. State*, 214 Ga. 778 (1959)
142. *Woods v. State*, 214 Ga. 546 (1959)
143. *Murray v. State*, 214 Ga. 350 (1958)
144. *Dobbs v. State*, 214 Ga. 206 (1958)
145. *Adams v. State*, 214 Ga. 131 (1958)
146. *Golden v. State*, 213 Ga. 481 (1957)
147. *Dupree v. State*, 213 Ga. 348 (1957)
148. *Mullins v. State*, 213 Ga. 331 (1957)
149. *Toler v. State*, 213 Ga. 12 (1957)
150. *Elder v. State*, 212 Ga. 705 (1956)
151. *Styles v. State*, 212 Ga. 698 (1956)
152. *Cooper v. State*, 212 Ga. 367 (1956)
153. *Cochran v. State*, 212 Ga. 245 (1956)
154. *Turner v. State*, 212 Ga. 199 (1956)
155. *Philpot v. State*, 212 Ga. 79 (1955)
156. *Domingo v. State*, 211 Ga. 691 (1955)
157. *Hill v. State*, 211 Ga. 683 (1955)
158. *Jackson v. State*, 211 Ga. 490 (1955)
159. *Corbin v. State*, 211 Ga. 400 (1955)
160. *Fields v. State*, 211 Ga. 335 (1955)
161. *Morgan v. State*, 211 Ga. 172 (1954)
162. *Williams v. State*, 210 Ga. 207 (1953)

IDAHO

163. *State v. Snowden*, 79 Idaho 266, 313 P.2d 706 (1957)

ILLINOIS

164. *People v. Ciucci*, 21 Ill. 2d 81, 171 N.E.2d 24 (1961)
165. *People v. Dukes*, 19 Ill. 2d 532, 169 N.E.2d 84 (1960)
166. *People v. Carpenter*, 11 Ill. 2d 60, 142 N.E.2d 11 (1957)

INDIANA

167. *State v. Kiefer*, 241 Ind. 176, 169 N.E.2d 723 (1960)

IOWA

168. *State v. Kelley*, 253 Iowa 1314, 115 N.W.2d 184 (1962)
169. *State v. Brown*, 253 Iowa 658, 113 N.W.2d 286 (1962)

KANSAS

170. *State v. Latham*, 190 Kan. 411, 375 P.2d 788 (1962)
171. *State v. York*, 190 Kan. 411, 375 P.2d 788 (1962)
172. *State v. Hickock*, 188 Kan. 473, 363 P.2d 541 (1961)
173. *State v. Smith*, 188 Kan. 473, 363 P.2d 541 (1961)
174. *State v. Andrews*, 187 Kan. 458, 375 P.2d 739 (1960)

KENTUCKY

175. *Commonwealth v. Moss*, 332 S.W.2d 650 (Ky. 1956)
176. *Commonwealth v. Bowman*, 290 S.W.2d 814 (Ky. 1956)
177. *Commonwealth v. DeBerry*, 289 S.W.2d 495 (Ky. 1956)
178. *Commonwealth v. Nichols*, 283 S.W.2d 184 (Ky. 1955)
179. *Commonwealth v. Milam*, 275 S.W.2d 921 (Ky. 1955)
180. *Commonwealth v. Merrifield*, 268 S.W.2d 405 (Ky. 1954)
181. *Commonwealth v. Tarrence*, 265 S.W.2d 52 (Ky. 1954)
182. *Commonwealth v. Tarrence*, 265 S.W.2d 40 (Ky. 1953)

LOUISIANA

- 183. *State v. Ferguson*, 240 La. 593, 124 So. 2d 558 (1960)
- 184. *State v. Faciane*, 233 La. 1028, 99 So. 2d 333 (1957)⁴
- 185. *State v. McMiller*, 233 La. 1028, 99 So. 2d 333 (1957)⁴
- 186. *State v. Bailey*, 233 La. 39, 96 So. 2d 34 (1957)
- 187. *State v. Sheffield*, 232 La. 53, 93 So. 2d 691 (1957)
- 188. *State v. Bush*, 230 La. 181, 88 So. 2d 19 (1956)⁵
- 189. *State v. Washington*, 230 La. 181, 88 So. 2d 19 (1956)⁵
- 190. *State v. Chinn*, 229 La. 984, 87 So. 2d 315 (1956)
- 191. *State v. Brazille*, 226 La. 254, 75 So. 2d 856; 229 La. 600, 86 So. 2d 208 (1956)⁶

MARYLAND

- 192. *State v. Lipscomb*, 223 Md. 599, 165 A.2d 918 (1960)
- 193. *State v. Shockley*, 218 Md. 491, 148 A.2d 371 (1959)
- 194. *State v. Kier*, 216 Md. 513, 140 A.2d 896 (1958)
- 195. *State v. Daniels*, 213 Md. 90, 131 A.2d 267 (1957)
- 196. *State v. Thomas*, 206 Md. 575, 112 A.2d 913 (1955)

MISSISSIPPI

- 197. *Jackson v. State*, 249 Miss. 202, 161 So. 2d 660 (1964)
- 198. *Slyter v. State*, 246 Miss. 821, 152 So. 2d 702 (1963)
- 199. *Anderson v. State*, 246 Miss. 402, 149 So. 2d 489 (1963)
- 200. *Simmons v. State*, 241 Miss. 481, 130 So. 2d 860 (1961)
- 201. *Stokes v. State*, 240 Miss. 453, 128 So. 2d 341 (1961)
- 202. *Goldsby v. State*, 240 Miss. 647, 123 So. 2d 429 (1960)
- 203. *Dean v. State*, 234 Miss. 376, 106 So. 2d 501 (1958)
- 204. *Wetzel v. State*, 232 Miss. 366, 98 So. 2d 767 (1957)
- 205. *Thompson v. State*, 231 Miss. 624, 97 So. 2d 626 (1956)
- 206. *Jackson v. State*, 228 Miss. 604, 89 So. 2d 626 (1956)
- 207. *Jones v. State*, 228 Miss. 458, 88 So. 2d 91 (1956)
- 208. *Townsel v. State*, 228 Miss. 110, 87 So. 2d 481 (1956)
- 209. *Sorber v. Wiggins*, 226 Miss. 693, 85 So. 2d 479 (1956)

⁴McMiller was involved along with 2 others and Faciane in a robbery of a store. Faciane shot the storekeeper's son. The opinion does not detail McMiller's degree of participation.

⁵No facts given in decision.

⁶No facts given in decisions.

- 210. *Russell v. State*, 226 Miss. 885, 85 So. 2d 585 (1956)
- 211. *Keeler v. State*, 226 Miss. 199, 84 So. 2d 153 (1955)
- 212. *Gilmore v. State*, 225 Miss. 173, 82 So. 2d 838 (1955)
- 213. *LaFontaine v. State*, 223 Miss. 562, 78 So. 2d 600 (1955)
- 214. *McNair v. State*, 223 Miss. 83, 77 So. 2d 306 (1955)
- 215. *Gallego v. State*, 222 Miss. 719, 77 So. 2d 321 (1955)
- 216. *Lewis v. State*, 222 Miss. 140, 75 So. 2d 448 (1954)
- 217. *Pope v. Wiggins*, 220 Miss. 1, 69 So. 2d 913 (1954)

MISSOURI

- 218. *State v. Anderson*, 386 S.W.2d 225 (Mo. 1963)
- 219. *State v. Tucker*, 362 S.W.2d 509 (Mo. 1963)
- 220. *State v. Moore*, 303 S.W.2d 60 (Mo. 1957)
- 221. *State v. Booker*, 276 S.W.2d 104 (Mo. 1955)

NEBRASKA

- 222. *Starkweather v. State*, 167 Neb. 477, 93 N.W.2d 619 (1958)

NEVADA

- 223. *Archibald v. State*, 77 Nev. 301, 362 P.2d 721 (1961)
- 224. *Steward v. State*, 346 P.2d 1083 (1959)

NEW JERSEY

- 225. *State v. Hudson*, 38 N.J. 364, 185 A.2d 1 (1962)
- 226. *State v. Ernst*, 32 N.J. 567, 161 A.2d 511 (1960)
- 227. *State v. Sturdivant*, 31 N.J. 165, 155 A.2d 771 (1959)
- 228. *State v. Stokes*, 19 N.J. 59, 115 A.2d 62 (1955)
- 229. *State v. A. Wise*, 19 N.J. 59, 115 A.2d 62 (1955)
- 230. *State v. H. Wise*, 19 N.J. 59, 115 A.2d 62 (1955)
- 231. *State v. Cruz*, 17 N.J. 572, 112 A.2d 247 (1955)⁷
- 232. *State v. Rios*, 17 N.J. 572, 112 A.2d 247 (1955)
- 233. *State v. Rodriguez*, 17 N.J. 572, 112 A.2d 247 (1955)⁷
- 234. *State v. Tune*, 17 N.J. 700, 110 A.2d 440 (1954)
- 235. *State v. Roscus*, 16 N.J. 415, 109 A.2d 1 (1954)
- 236. *State v. Monohan*, 16 N.J. 83, 106 A.2d 287 (1954)

⁷Non-triggermen in felony murder.

NEW MEXICO

237. *State v. Nelson*, 65 N.M. 403, 338 P.2d 301 (1959)
 238. *State v. Upton*, 60 N.M. 205, 290 P.2d 440 (1956)

NEW YORK

239. *People v. Mays*, 13 N.Y.2d 784, 192 N.E.2d 173 (1963)
 240. *People v. Wood*, 12 N.Y.2d 69, 187 N.E.2d 116 (1962)
 241. *People v. Miller*, 9 N.Y.2d 839, 175 N.E.2d 547 (1961)
 242. *People v. Downs*, 8 N.Y.2d 860, 168 N.E.2d 710 (1960)
 243. *People v. Philips*, 8 N.Y.2d 850, 203 N.Y.S.2d 900 (1960)
 244. *People v. Chapman*, 8 N.Y.2d 809, 202 N.Y.S.2d 25 (1960)*
 245. *People v. Flakes*, 8 N.Y.2d 806, 202 N.Y.S.2d 21 (1960)*
 246. *People v. Green*, 8 N.Y.2d 806, 202 N.Y.S.2d 21 (1960)*
 247. *People v. Vargas*, 7 N.Y.2d 555, 200 N.Y.S.2d 29 (1960)
 248. *People v. Mason*, 7 N.Y.2d 891, 197 N.Y.S.2d 200 (1960)
 249. *People v. Keith*, 6 N.Y.2d 880, 188 N.Y.S.2d 998 (1959)
 250. *People v. Dawkins*, 6 N.Y.2d 814, 188 N.Y.S.2d 201 (1959)*
 251. *People v. Richardson*, 5 N.Y.2d 767, 179 N.Y.S.2d 861 (1958)*
 252. *People v. Dan*, 4 N.Y.2d 934, 175 N.Y.S.2d 174 (1958)*
 253. *People v. LaMarca*, 4 N.Y.2d 925, 175 N.Y.S.2d 167 (1958)
 254. *People v. Ecksworth*, 4 N.Y.2d 923, 175 N.Y.S.2d 164 (1958)
 255. *People v. Turner*, 4 N.Y.2d 731, 171 N.Y.S.2d 119 (1958)*
 256. *People v. Burke*, 3 N.Y.2d 985, 169 N.Y.S.2d 743 (1957)
 257. *People v. Santiago*, 3 N.Y.2d 809, 166 N.Y.S.2d 9 (1957)

*In the cases marked by an asterisk, the reported opinion does not describe the facts of the case; the facts were obtained from the appellate briefs.

258. *People v. Taylor*, 2 N.Y.2d 1009, 163 N.Y.S.2d 617 (1957)*
 259. *People v. Browne*, 2 N.Y.2d 842, 159 N.Y.S.2d 981 (1957)
 260. *People v. Salemi*, 2 N.Y.2d 159, 159 N.Y.S.2d 972 (1957)
 261. *People v. Reade*, 1 N.Y.2d 959, 154 N.Y.S.2d 27 (1956)
 262. *People v. Edwards*, 1 N.Y.2d 830, 153 N.Y.S.2d 213 (1956)
 263. *People v. Newman*, 1 N.Y.2d 666, 150 N.Y.S.2d 196 (1956)
 264. *People v. Byers*, 309 N.Y. 903, 134 N.E.2d 580 (1955)
 265. *People v. Roye*, 309 N.Y. 903, 131 N.E.2d 578 (1955)
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- 280. *State v. Byomin*, 106 Ohio App. 393, 154 N.E.2d 823 (1959)
- 281. *State v. Tannyhill*, 101 Ohio App. 466, 140 N.E.2d 332 (1956)
- 282. *State v. Allen*, 133 N.E.2d 167 (1956)

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- 283. *French v. State*, 416 P.2d 171 (1966)
- 284. *Dare v. State*, 378 P.2d 339 (1963)
- 285. *Doggett v. State*, 371 P.2d 523 (1960)
- 286. *Spence v. State*, 353 P.2d 1114 (1959)
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- 288. *Hendricks v. State*, 296 P.2d 205 (1956)
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- 290. *State v. McGahuey*, 230 Or. 643, 371 P.2d 669 (1962)

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- 300. *Commonwealth v. Smith*, 405 Pa. 456, 176 A.2d 33 (1961)
- 301. *Commonwealth v. Schuck*, 401 Pa. 222, 164 A.2d 13 (1960)
- 302. *Commonwealth v. McCoy*, 401 Pa. 100, 162 A.2d 636 (1960)
- 303. *Commonwealth v. Graves*, 394 Pa. 429, 147 A.2d 416 (1959)
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- 311. *Commonwealth v. Edwards*, 380 Pa. 52 (1954)

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- 312. *State v. Young*, 119 S.E.2d 504 (S.C. 1961)
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- 318. *State v. Fuller*, 87 S.E.2d 287 (S.C. 1955)

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- 319. *Gibbs v. State*, 300 S.W.2d 890 (Tenn. 1957)
- 320. *Kirkendoll v. State*, 281 S.W.2d 243 (Tenn. 1955)
- 321. *Sullins v. State*, 281 S.W.2d 243 (Tenn. 1955)¹¹

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- 322. *Johnson v. State*, 378 S.W.2d 76 (Tex. Cr. App. 1964)
- 323. *Bradford v. State*, 372 S.W.2d 336 (Tex. Cr. App. 1963)
- 324. *Lavan v. State*, 363 S.W.2d 139 (Tex. Cr. App. 1963)
- 325. *Stein v. State*, 172 Tex. Crim. 248, 355 S.W.2d 723 (1962)
- 326. *Mosley v. State*, 172 Tex. Crim. 117, 354 S.W.2d 391 (1962)
- 327. *Wilson v. State*, 171 Tex. Crim. 573, 352 S.W.2d 114 (1961)
- 328. *Luton v. State*, 171 Tex. Crim. 441, 350 S.W.2d 853 (1961)

¹⁰It is unclear from the reported opinions as to which of these co-defendants shot the victim.

¹¹Non-triggerman in felony murder.

- 329. *Wiley v. State*, 171 Tex. Crim. 366, 350 S.W.2d 22 (1961)¹²
- 330. *Leath v. State*, 171 Tex. Crim. 209, 346 S.W.2d 346 (1961)
- 331. *Johnson v. State*, 169 Tex. Crim. 612, 336 S.W.2d 175 (1960)
- 332. *Stickney v. State*, 169 Tex. Crim. 533, 336 S.W.2d 133 (1960)
- 333. *Williams v. State*, 169 Tex. Crim. 370, 333 S.W.2d 846 (1960)
- 334. *Philpot v. State*, 169 Tex. Crim. 91, 332 S.W.2d 323 (1960)
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- 336. *Moses v. State*, 168 Tex. Crim. 206, 328 S.W.2d 885 (1959)
- 337. *Smith v. State*, 168 Tex. Crim. 102, 323 S.W.2d 443 (1959)
- 338. *Slater v. State*, 166 Tex. Crim. 66, 317 S.W.2d 203 (1958)
- 339. *White v. State*, 165 Tex. Crim. 339, 306 S.W.2d 903 (1957)¹³
- 340. *Shaver v. State*, 165 Tex. Crim. 276, 306 S.W.2d 128 (1957)
- 341. *Lamkin v. State*, 165 Tex. Crim. 11, 301 S.W.2d 922 (1957)
- 342. *Hall v. State*, 164 Tex. Crim. 573, 301 S.W.2d 161 (1957)
- 343. *McGowen v. State*, 163 Tex. Crim. 587, 290 S.W.2d 520 (1956)
- 344. *Webb v. State*, 163 Tex. Crim. 392, 291 S.W.2d 331 (1956)

¹²While it is unclear from the reported decision whether the victim was killed by Wiley or by co-defendant McDade or both, Wiley was executed whereas McDade was not.

¹³No facts stated as to which of two co-defendants killed the victim.

- 345. *Bingham v. State*, 163 Tex. Crim. 353, 290 S.W.2d 915 (1956)
- 346. *Washington v. State*, 162 Tex. Crim. 479, 286 S.W.2d 629 (1956)
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- 351. *Brown v. State*, 160 Tex. Crim. 150, 267 S.W.2d 819 (1954)

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- 352. *State v. Gilmore*, (Cr. No. 6405, 4th Jud. Dist., 1976)
- 353. *State v. Kirkham*, 7 Utah 2d 108, 319 P.2d 859 (1958)
- 354. *State v. Neal*, 123 Utah 93, 254 P.2d 1053 (1953)
- 355. *State v. Braasch*, 119 Utah 450, 229 P.2d 289 (1951)
- 356. *State v. Sullivan*, 119 Utah 450, 229 P.2d 289 (1951)

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- 357. *Fuller v. Commonwealth*, 201 Va. 724, 113 S.E.2d 667 (1960)

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- 358. *State v. Self*, 59 Wash. 2d 62, 366 P.2d 193 (1961)
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- 360. *State v. Farley*, 48 Wash. 2d 11, 290 P.2d 987 (1955)

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- 361. *State v. Brunner*, 143 W. Va. 755, 105 S.E.2d 140 (1958)

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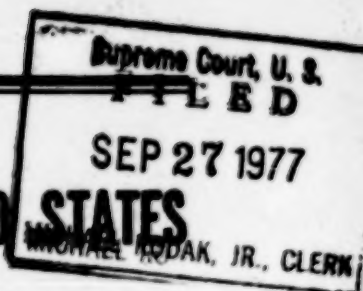
- 362. *Pixley v. State*, 406 P.2d 662 (Wyoming 1965)

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2. *State v. Shelton*, 51 Ohio St. 2d 68 (1977)
3. *State v. Downs*, 51 Ohio St. 2d 47 (1977)
4. *State v. Jackson*, 50 Ohio St. 2d 253 (1977)
5. *State v. Weind*, 50 Ohio St. 2d 224 (1977)
6. *State v. C. Osborne*, 50 Ohio St. 2d 211 (1977)
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8. *State v. A. Osborne*, 49 Ohio St. 2d 135 (1977)
9. *State v. Lane*, 49 Ohio St. 2d 77 (1977)
10. *State v. Lockett*, 49 Ohio St. 2d 48 (1976)
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13. *State v. Royster*, 48 Ohio St. 2d 381 (1976)
14. *State v. Lytle*, 48 Ohio St. 2d 361 (1976)
15. *State v. Harris*, 48 Ohio St. 2d 351 (1976)
16. *State v. Hall*, 48 Ohio St. 2d 325 (1976)
17. *State v. Bates*, 48 Ohio St. 2d 315 (1976)
18. *State v. Bell*, 48 Ohio St. 2d 270 (1976)
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977



No. 76-6513

WILLIE LEE BELL,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

On Writ of Certiorari to the Supreme Court of Ohio

BRIEF OF RESPONDENT

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- B. The character and the record of the offender are a meaningful part of the mitigation process in capital cases in Ohio. 44
- C. The mitigating factors to be considered by the trial court in capital cases in Ohio are broad and general enough so as to insure that the death penalty will not be imposed in an arbitrary or capricious manner. 49
- D. The imposition of the death penalty upon an offender who had a long record of offenses which if committed by an adult would be felonies; and, who was sixteen at the time; and, whose thinking at the time of the presentence exam was

clear, coherent and well organized and reflected an IQ between 110 to 120; and, whose attitude was "its a matter of life and death" with regard to the capital offense for which he was charged; and, who was either the triggerman or who actively aided and abetted the triggerman in the kidnapping of the victim and killing the victim; and who had gone out with his accomplice and had just kidnapped a second victim in the same manner as the decedent within less than 24 hours of the decedents death does not offend the contemporary standards of decency embodied in the constitutional prohibition against cruel and unusual punishment. 61

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IN THE
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OCTOBER TERM, 1977

No. 76-6513

WILLIE LEE BELL,
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THE STATE OF OHIO,
Respondent.

On Writ of Certiorari to the Supreme Court of Ohio

BRIEF OF RESPONDENT

OPINIONS BELOW

The opinion of the Supreme Court of Ohio (A 130) reported in 48 O.S. (2d) 270, 358 N.E. (2d) 556 2nd, and the unreported opinion of the Court of Appeals of the First Appellate District (A 144) are reproduced in the Appendix.

JURISDICTION

Jurisdiction of this Court is based upon the order of the Court dated June 27, 1977, in which this Court granted a Writ of Certiorari to the Supreme Court of Ohio under 28 U.S.C. Section 1257 (3) in which this Court accepted

jurisdiction on the question of whether or not the Ohio death penalty statute violated the Eighth Amendment of the United States Constitution as to cruel and unusual punishment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves certain provisions of the Eighth and Fourteenth Amendments to the Constitution of the United States, the Ohio statutes with regard to the death penalty and certain other Ohio statutes.

CONSTITUTIONAL AND STATUTORY PROVISIONS

A. THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

B. THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

In pertinent part, the Fourteenth Amendment provides:

"... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

C. THE OHIO AGGRAVATED MURDER STATUTES:

Section 2903.01 Aggravated murder

- (A) No person shall purposely, and with prior calculation and design, cause the death of another.
- (B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.
- (C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

Section 2920.02 Penalties for murder

- (A) Whoever is convicted of aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.03 and 2929.04 of the Revised Code. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.
- (B) Whoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life. In addition, the offender may be fined an amount fixed by the court, but not more than fifteen thousand dollars.
- (C) The court shall not impose a fine in addition to imprisonment or death for aggravated murder, or in addition to imprisonment for murder, unless the offense was committed with purpose to establish, maintain, or facilitate an activity

of, a criminal syndicate as defined in section 2923.04 of the Revised Code, or was committed for hire or for purpose of gain.

- (D) The court shall not impose a fine or fines for aggravated murder or murder which, in the aggregate and to the extent not suspended by the court, exceeds the amount which the offender is or will be able to pay by the method and within the time allowed without undue hardship to himself or his dependents, or will prevent him from making reparation for the victim's wrongful death.

Section 2920.03 Imposing sentence for a capital offense.

- (A) If the indictment or count in the indictment charging aggravated murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment on the offender.
- (B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

- (C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.03 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

- (1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;

- (2) By the trial judge, if the offender was tried by jury.

- (D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.
- (E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court

pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.

Section 2929.04 Criteria for imposing death or imprisonment for a capital offense

- (A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated robbery, or aggravated burglary.

- (B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the of-

fender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

THE OHIO COMPLICITY (AIDER AND ABETTOR) STATUTE:

OHIO REVISED CODE

E. Complicity, Section 2923.03, Revised Code.

1. Text of Section 2923.03, R.C. eff. 1-1-74

Section 2923.03 (A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:

(1) Solicit or procure another to commit the offense;

(2) Aid or abet another in committing the offense;

(3) Conspire with another to commit the offense in violation of section 2923.01, R.C.;

(4) Cause an innocent or irresponsible person to commit the offense.

(B) It is no defense to a charge under this section that no person with whom the accused was in complicity has been convicted as a principal offender.

(C) No person shall be convicted of complicity under this section unless an offense is actually committed, but a person may be convicted of complicity in an attempt to commit an offense in violation of section 2923.02, R.C.

(D) No person shall be convicted of complicity under this section solely upon the testimony of an accomplice, unsupported by other evidence.

(E) It is an affirmative defense to a charge under this section that, prior to the commission of or attempt to commit the offense, the actor terminated his complicity, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

(F) Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section, or in terms of the principal offense.

APPELLATE RULES

RULE 4. Appeal as of right — when taken

* * *

(B) Appeals in criminal cases. In a criminal case the notice of appeal by a defendant shall be filed with the clerk of the trial court within thirty days of the date of the entry of the judgment or order appealed from. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof. If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within thirty days after the entry of an order denying the motion. A motion for a new trial on the ground of newly discovered evidence, made after expiration

of the time for filing a motion for new trial on other grounds, will not extend the time for appeal from a judgment of conviction. In an appeal by the prosecution, the notice of appeal shall be filed in the trial court within thirty days of the date of the entry of the judgment or order appealed from. A judgment or order is entered within the meaning of this subdivision when it is filed with the clerk of the trial court for journalization.

RULE 12. Determination and judgment on appeal

(A) **Determination.** In every appeal from a trial court of record to a court of appeals, not dismissed, the court of appeals shall review and affirm, modify, or reverse the judgment or final order of the trial court from which the appeal is taken. The appeal shall be determined on its merits on the assignments of error set forth in the briefs required by Rule 16, on the record on appeal as provided by Rule 9, and, unless waived, on the oral arguments of the parties, or their counsel, as provided by Rule 21. Errors not specifically pointed out in the record and separately argued by brief may be disregarded. All errors assigned and briefed shall be passed upon by the court in writing, stating the reasons for the court's decision.

CONSTITUTION OF THE STATE OF OHIO

Art. IV, § 2

§ 2. Supreme court.

* * *

(B) (1) The supreme court shall have original jurisdiction in the following:

- (a) Quo warranto;
- (b) Mandamus;
- (c) Habeas corpus;
- (d) Prohibition;
- (e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination;

(g) Admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.

(2) The supreme court shall have appellate jurisdiction as follows:

(a) In appeals from the courts of appeals AS A MATTER OF RIGHT the following:

- (i) Cases originating in the courts of appeals;
- (ii) CASES IN WHICH THE DEATH PENALTY HAS BEEN AFFIRMED;
- (iii) Cases involving questions arising under the constitution of the United States or of this state.

(b) In appeals from the courts of appeals in cases of felony on leave first obtained.

(c) Such revisory jurisdiction of the proceedings of administrative officers or agencies as may be conferred by law;

(d) In cases of public or great general interest, the supreme court may direct any court of appeals to certify its record to the supreme court, and may review and affirm, modify, or reverse the judgment of the court of appeals;

(e) The supreme court shall review and affirm, modify, or reverse the judgment in any case certified by any court of appeals pursuant to section 3 (B) (4) of this article.

(3) No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court.

(C) The decisions in all cases in the supreme court shall be reported, together with the reasons therefor.
(Amended by 132 v HR 42, eff. 5-7-68; 120 v 743)
(Capitalization ours for emphasis)

QUESTIONS PRESENTED

Whether the imposition of the sentence for the crime of aggravated murder under the laws of the State of Ohio (effective January 1, 1974) violates the protection against cruel and unusual punishment secured to all persons by the Eighth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner Bell and one Samuel Hall were jointly indicted by the Grand Jury of Hamilton County, Ohio, on November 22, 1974, for two counts of aggravated murder with specifications, one count of kidnapping and one count of aggravated robbery. Petitioner Bell and Samuel Hall were tried separately, each to a three-judge panel from the Court of Common Pleas for Hamilton County, Ohio.

On January 10, 1975, Petitioner's motion to determine his ability to stand trial was heard by a single trial judge. After hearing the evidence the court found the Petitioner to be competent to stand trial. After that determination had been made the Petitioner voluntarily waived a trial by jury and requested a three-judge panel to hear the case (R 53-58).

Four days later on January 14, 1975, Petitioner's motion to suppress the statement Petitioner had given to the police was overruled. That same day the trial on the merits commenced before the three-judge panel.

The evidence revealed that the petitioner and Samuel Hall had borrowed Samuel Hall's brother's car and that they drove to the Park Lane Apartments on Victory Park-

way and Reading Road in Cincinnati, Ohio. As the victim drove his car into the parking area for said apartments the defendants drove in behind him. The victim, Mr. Graber, was forced out of his car and kidnapped at gunpoint and forced to lie in the trunk of his car. At that time the petitioner drove the car of Samuel Hall's brother back to the brother's residence. Samuel Hall drove the victim's (Mr. Graber) car with the victim inside of the trunk back to his brother's residence. When Samuel Hall picked up the petitioner he turned the driving over to the petitioner. The petitioner drove the car to a generally isolated area and the co-defendant Samuel Hall picked out a side drive and told the petitioner to pull the car into the isolated area. The petitioner drove the car into the side drive and without any further directions from Hall turned the car around so that the trunk of the car was the furthest from the road (R 340). After the car was parked the petitioner asked the co-defendant Hall what they were going to do next. He then turned off the lights to the car and backed it further into the isolated area off of the roadway. The petitioner then gave Samuel Hall the keys to the car and they removed the victim from the trunk of the car and led him into the woods.

Robert Pierce who lived in an apartment building adjacent to the isolated roadway was sitting outside in his car at the time. He had just arrived and he observed the car off the roadway with only the parking lights on. He then "heard two doors close; one after the other" (R 160). The next thing he heard was "Don't shoot me. Don't shoot me." Then he heard a shotgun blast, a short interval of time passed and he heard a second shotgun blast. Mr. Pierce continued to watch the cemetery as Samuel Hall entered the automobile from the passenger's side and moved over to the driver's seat. The car then approached

the roadway without any headlights on and turned onto the highway and drove off into the night.

The police were notified immediately. They responded to the scene of the shooting within minutes. Mr. Graber had sustained a shotgun blast to the rear of his head. The officers detected signs of life by way of pulsating blood emanating from the exposed area of the brain (R 190). The life squad was then summoned. However, by the time the life squad transported Mr. Graber to the Cincinnati General Hospital, he had expired.

Later, at the morgue, the officers discovered that Mr. Graber had attempted to secret valuables such as his ring, money and keys in his pockets and shoes. In the opinion of the Coroner the fatal shot to the rear of Mr. Graber's head was fired at contact range with Mr. Graber's hands being clasped behind his head at the time of the shooting.

After the shooting the Petitioner and Samuel Hall drove to Dayton, Ohio, in the victim's automobile. The next morning they went to a gas station where they commandeered the gas station attendant Kenneth Hardin into the trunk of his automobile at gunpoint. The petitioner held the gun on the attendant while the co-defendant Hall removed the keys and put the new victim in the trunk. Samuel Hall drove the car with the new victim in the trunk and the petitioner followed behind in the car of the victim Graber; who had previously been killed. Fortunately, a state highway partolman stopped Samuel Hall who was driving the new victim Hardin's car for a faulty muffler. The petitioner, who was following in the first victim Graber's car saw the state highway patrolman stop his companion. He then continued on to Cincinnati where he abandoned the Graber victim's automobile in a vacant garage near his home.

One week after the homicide the police went to the Petitioner's residence to ask him to come with them to the police station to answer some questions concerning Samuel Hall. Once it became apparent that the Petitioner was also involved in the homicide of Julius Graber, the police advised him of his constitutional rights.

The officers told the Petitioner they would like him to make a tape recorded statement and that he had a right to have his mother present with him when he gave the statement if he so desired. The Petitioner stated he did not want his mother to be present. The police then called Petitioner's mother, advised her that her son was involved in a homicide and kidnapping and that he had admitted his involvement. Petitioner's mother informed the police she did not want to come down to the police station and that her son could give the statement.

Expert testimony revealed that the fatal shot was fired from the same shotgun that was recovered from the Hardin vehicle that Samuel Hall was driving at the time of his arrest. Further expert testimony demonstrated that Petitioner's fingerprint was located on the outside window on the driver's side of the Graber vehicle.

Based on the evidence adduced at trial the three-judge panel found the Petitioner guilty of Aggravated Murder while committing Kidnapping as well as finding him guilty of Aggravated Robbery and Kidnapping.

Pre-sentence and psychiatric examinations were ordered pursuant to the Ohio statutes prior to the imposition of sentence. On February 3, 1975, a mitigation hearing was held before the three-judge panel.

The mitigation hearing consisted basically of the pre-sentence report that the Court had ordered; the testimony of the psychiatrists appointed by the Court and some teachers of the petitioner.

The pretrial psychiatric report reflected that although "he did admit having taken a tablet of 'Mescaline Blue', which he claims was a downer, and also smoking marijuana; however, HIS PERCEPTIONS WERE NOT DISTORTED AND THERE WAS NO EVIDENCE FROM HIS HISTORY THAT HE WAS HAVING HALLUCINATIONS OR ANY OTHER DRUG EFFECT." (Appendix 39) (Capitalization ours for emphasis).

The presentence report further reflected that his "mental status conducted by the examiners indicated that he was in contact with reality, his thought processes were clear, logical and coherent" (Appendix 39).

His general attitude was " 'ITS JUST A MATTER OF LIFE AND DEATH'." (Appendix 39) (Capitalization ours for emphasis).

In the postconviction psychiatric report which was before the Court for mitigation purposes the defendant-petitioner Bell stated "that he was not afraid of Sam Hall" (Appendix 43).

In the course of this post conviction psychiatric report the defendant-petitioner "admitted that he had taken up with Sam Hall because he admired his style and the fact that he had always hung around older individuals." (Appendix 44).

The psychiatrists concluded that "direct mental status examination revealed again that his thinking was clear, coherent, and well organized . . . (and) . . . on standard psychological mental status testing he scored an IQ of about 110 to 120." (Appendix 44).

The examiners concluded that in so far as the psychological aspects of the mitigation were concerned the defendant had shown none of them.

The defendant's prior record as a juvenile reflected amongst other things that he was found guilty on different occasions as a juvenile of housebreaking, riding in a stolen car, robbery, auto theft, and trespassing. (Appendix 51). The presentence report further reflected that the sentences of the Juvenile Court which included probation, house arrest and fines did not cause any "perceivable alteration on his behavior pattern".

The presentence report further reflected that "both Hall and Bell accused each other of actually firing the sawed-off shotgun" (Appendix 51).

According to the presentence report Bell admitted to the investigator that he "backed into the access road so that Graber (the victim) could get out of the back of the vehicle without being seen."

In the course of the mitigation hearing the psychiatrist chosen to present the unanimous opinion of the panel of three psychiatrists stated that Willie Bell did not have a mental psychosis or a mental deficiency at the time of the killing (Appendix 103 and 104).

The Court then heard the arguments of counsel on the question of mitigation. Counsel for the defendant-petitioner in his arguments, amongst other things, argued the question of the defendants age as a mitigating factor and (if you believe the self-serving story of the petitioner that Hall actually shot the decedent) the fact that his client did not actually pull the trigger of the gun.

After hearing all the evidence the court unanimously found no mitigating circumstances to be present. Accordingly, the Petitioner was sentenced to death.

The conviction and sentence were affirmed by the Court of Appeals of the First Appellate District of Ohio, Hamilton County, on April 12, 1976. The Supreme Court of Ohio affirmed the conviction and sentence on December 22,

1976. Petitioner's motion for rehearing was denied by the Supreme Court of Ohio on January 14, 1977. The Petitioner then filed a Petition for Certiorari which was granted on June 27, 1977.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Counsel for the respondent concedes the fact that counsel for the defendant-petitioner attacked the constitutionality of the death penalty statute as being violative of the Eighth and Fourteenth Amendments to the United States Constitution. However, counsel specifically reflects and calls this Court's attention to the fact that the death penalty was attacked on the basis that the very nature of the penalty made it unconstitutional and by the arbitrary and capricious manner of its enforcement under the Ohio Revised Code (Appendix 19).

For the purpose of the record counsel for the respondent denies that the other attacks on the constitutionality of the Ohio death penalty statute were ever raised in the trial Court or lower courts.

SUMMARY OF ARGUMENT

We submit that in order to fully understand and comprehend the reasons we believe the Ohio death penalty statutes to be constitutional, one must look to the history of the statutes and death penalty and the interpretations given that statute by the Courts.

In 1972 this Court in the case of *Furman v. Georgia*, 408 U.S. 238 (1972), declared that the death penalty statutes in the various states were unconstitutional. There were many varied opinions rendered in that case with certain justices indicating that the death penalty under all circumstances was unconstitutional and others indicating that under the appropriate circumstances the death penalty was constitutional. Between these two general lines of reason a third line of thought appeared in which the justices appeared to indicate that they believed that there was too much uncontrolled discretion without any guidelines in the implementation of that discretion so that the death penalty was being imposed in an arbitrary, capricious and standardless manner which resulted in a wanton and freakish imposition of said penalty.

Two general lines of thought then arose as to interpreting this Court's decision in the *Furman* case (ibid).

The first line of thinking was to make the death penalty mandatory upon the showing of certain types of crime without any discretion in the imposition of the sentence. This line of reasoning was subsequently determined not to be appropriate as reflected in this Court's opinion in *Woodson v. North Carolina*, 428 U.S. 280 (1976).

The second line of thinking was that the death penalty itself was not unconstitutional provided there was even-handed justice and there were guidelines to insure that

it would not be inflicted in an arbitrary and capricious manner.

The legislature of Ohio followed this second line of interpretation when they enacted the new criminal code and the included death penalty statutes in response to this Court's decision in the *Furman* case (ibid).

In Ohio not every murder brings on the death penalty. It is only in certain specific types of cases that the death penalty may be imposed.¹

Not only is the death penalty limited to the certain specific type of cases but it is also required that the state

¹ "Ohio Revised Code 2929.04 Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment . . . and is proved beyond a reasonable doubt:

- (1) The offense was the assassination of the president of the United States or certain specific office holders specifically enumerated.
- (2) The offense was committed for hire.
- (3) The offense was for the purpose of escaping detection, apprehension, trial or punishment for another offense committed by the offender.
- (4) The offense was committed while the offender was a prisoner in a detention facility.
- (5) The offender has previously been convicted of an offense of which the gist was the purposeful killing or attempt to kill another committed prior to the offense at bar, or the offense at bar was a part of a course of conduct involving the purposeful killing or attempt to kill two or more persons by the offender.
- (6) The victim was a law enforcement officer whom the offender knew to be such and either the victim was engaged in his duties at the time or it was the offenders purpose to kill a law enforcement officer.
- (7) The offense was committed while the offender was committing, attempting to commit or fleeing after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery or aggravated burglary."

specifically set forth the aggravated circumstance in the indictment and prove it beyond a reasonable doubt.²

Therefore the legislature has clearly set forth certain specific definable standards in limiting the type of cases (murder cases) in which this penalty can be imposed.

If this were all that was before the Court and if the legislature had left out the mitigating circumstances; then the Ohio statute would be unconstitutional under the majority opinion in *Woodson v. North Carolina*, 428 U.S. 230 (1976).

As indicated, Ohio has two parts to its hearing in death penalty cases; the first being the trial and proof of the defendant's guilt; and, the second being the mitigation hearing.

Rather than leave the matter to the unbridled discretion of the trial court judge, and to assure the even handed administration of justice in the imposition of this penalty, the Ohio legislature set forth specific guidelines for the trial judges to follow at a mitigation hearing, thus assuring the uniform implementation of the sentence.³

² Ohio Revised Code 2929.04(A).

³ Ohio Revised Code 2929.04(B)

"Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance of the evidence:

- (1) The victim of the offense induced or facilitated it.
- (2) It is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion, or strong provocation.
- (3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity."

The Supreme Court of Ohio, in interpreting the new Ohio death penalty statute, determined that the Ohio mitigating factors were similar to those approved by this Court in *Proffitt v. Florida*, 428 U.S. 242 (1976).⁴

They also indicated that they would review each case to assure the uniform and fair imposition of the death penalty by trial judges.⁵

The Ohio Supreme Court went on to state that they would "allow the broadest consideration of mitigating circumstances consistent with their language."⁶

The Court also stated that the mitigating circumstances must be liberally construed in favor of the accused.⁷

The Supreme Court of Ohio went on to determine that the age of the defendant and his prior record were relevant factors to consider at the mitigation hearing.⁸

Thus it can be seen that the Ohio statute in its two step procedure affords to the defendant all of the guarantees to specifically limit the type of cases in which the death penalty is imposed and to place guidelines on the

⁴ "The mitigating factors, as with any legislation may require judicial interpretation and clarification, but they are basically reasonable and similar to those approved in *Proffitt v. Florida*, supra. (49 L. Ed. 2d 913) and they do clearly guide the sentencing judge or judges in their decision." *State v. Bayless*, 48 O.S. (2d) 73 (1976) at page 86.

⁵ "We have in this case, and will in all capital cases, independently review the aggravating and mitigating circumstances presented by the facts of each case to assure ourselves that capital sentences are fairly imposed by Ohio trial judges." *State v. Bayless*, 48 O.S. (2d) 73 (1976) at page 86.

⁶ *State v. Bayless*, 48 O.S. (2d) 73 (1976) at page 86.

⁷ "This language must be strictly construed against the state and liberally construed in favor of the accused R.C. 2901.04(A)." *State v. Woods*, 48 O.S. (2d) 127 (1976) at page 134 and 135.

⁸ *State v. Bell*, 48 O.S. (2d) 270 (1976) at page 280; Appendix page 141.

mitigation hearing to assure its evenhanded fairness in a uniform manner throughout the state.

We further submit that a defendant who has received the death penalty has an absolute right of appeal both to the Court of Appeals and to the Supreme Court of Ohio which reviews each case on an individual basis to assure that the death penalty is not imposed in a wanton or freakish manner.

We therefore submit that based upon the issue on which the Supreme Court has admitted this case on certiorari; the Ohio statute is constitutional.

Defense counsel have endeavored to sneak into this matter a completely new issue; to the effect that the Ohio statute is unconstitutional in violation of the Sixth Amendment to the Constitution. This Court granted certiorari in this matter relative to violations of the Eighth and Fourteenth Amendments to the Constitution and not with regard to the Sixth Amendment. However, even if this Court were to consider this Sixth Amendment argument; it is our opinion that this Court has disposed of this issue in the *Proffitt v. Florida* case.⁹

We therefore submit that our arguments as hereinafter set forth will in response to the issues presented by the petitioner; clearly show that the Ohio death penalty under the new Ohio Revised Code is constitutional insofar as its language, its interpretation and its imposition.

⁹ "This court . . . has never suggested that jury sentencing is constitutionally required . . ." *Proffitt v. Florida*, 428 U.S. 242 (1976) at page 252.

ARGUMENT

THE IMPOSITION OF THE SENTENCE OF DEATH FOR THE CRIME OF AGGRAVATED MURDER UNDER THE LAWS OF THE STATE OF OHIO (EFFECTIVE JANUARY 1, 1974) IS CONSTITUTIONAL AND DOES NOT VIOLATE THE PROTECTION AGAINST CRUEL AND UNUSUAL PUNISHMENT SECURED TO ALL PERSONS BY THE EIGHTH AND THE FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

In 1972, this Court declared the various state statutes imposing the death penalty to be cruel and unusual punishment as they were then written in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

At that time the Ohio Legislature was in the process of redrafting the entire criminal code. By virtue of the number of opinions and determinations contained therein in the *Furman v. Georgia* case as reported in 408 U.S. 238 (1972), there was no clear determination as to what type of statute would pass constitutional scrutiny by this Court. Certain state legislatures adopted mandatory death penalties without any mitigating factors. Others adopted a two part proceeding with the types of cases in which the death penalty could be imposed specifically limited. After a determination of guilt, a mitigation type hearing would be had in which guidelines for extending mitigation would be set to assure the even-handed administration of this type of hearing to all persons charged.

The Ohio and Florida legislatures were two of the many

who set up this two part proceeding with guidelines on the second part.

Subsequently this Court released its decisions in five of the cases pending before it involving the death penalty.¹⁰

We respectfully submit that the Ohio statute will pass the constitutional tests previously enunciated by this Court in light of the fact that:

- (1) The death penalty is only applicable in Ohio as a punishment in a case in which a life has been taken;
- (2) Only specifically designated types of killing (specifications of aggravation) can bring on the death penalty;
- (3) The legislature has by statute set forth broad general guidelines for the conduct of the mitigation hearing;
- (4) The statute and the judicial interpretation thereon has set up the purpose of the mitigation hearing "is to recognize that the punishment assigned for a criminal act may, for ethical and humanitarian reasons be tempered out of consideration for the individual offender and his crime;"¹¹
- (5) The Ohio statutes require the Court to obtain a presentence report and a psychiatric examination of the defendant with copies of each being furnished to counsel;

¹⁰ *Gregg v. Georgia*, 428 U.S. 153; *Jurek v. Texas*, 428 U.S. 262; *Proffitt v. Florida*, 428 U.S. 242; *Woodson v. North Carolina*, 428 U.S. 280; and *Stanislaw Roberts v. Louisiana*, 428 U.S. 325.

¹¹ *State v. Woods*, 48 O.S. (2d) 120 at page 137 (1976).

- (6) The mitigating circumstances in O.R.C. Section 2929.04 (B) channel and guide the discretion of the sentencing authority so as to avoid the arbitrary and capricious imposition of the death penalty;
- (7) Every death sentence is reviewed by way of the right of direct appeal to the Court of Appeals and the Supreme Court of Ohio.

We believe that the totality of the statute, the interpretations given said statute by the upper Ohio courts, and the manner of appellate review will clearly reflect that the Ohio death penalty statutes is neither violative of the Eighth or Fourteenth Amendments to the United States Constitution.

I.

THE OHIO CAPITAL PUNISHMENT STATUTES PROVIDE BROAD GENERAL GUIDELINES IN THE SENTENCING PROCEDURE SO AS TO CHANNEL THE JUDGES DISCRETION IN ORDER TO INDIVIDUALIZE THE SENTENCE TO THE PARTICULAR DEFENDANT AND THEY PROVIDE FOR A MEANINGFUL CONSIDERATION OF THE CHARACTER AND RECORD OF THE OFFENDER AND THE NATURE AND CONSIDERATION OF HIS INVOLVEMENT IN THE DEATH OF ANOTHER AT SAID MITIGATION OF SENTENCE HEARING.

We take strong exception to the statements in counsel's brief that the Ohio sentencing procedures provide for a mandatory sentence.

As we will reflect in the various subparagraphs of our brief, we will show where the legislature has set up specific guidelines and where the Supreme Court of Ohio has interpreted those guidelines so that the punishment assigned for the criminal act, for ethical and humanitarian reasons, is tempered out of consideration for the individual offender and his crime. We further submit that absent any guidelines upon which the mitigation shall or shall not be granted would bring us right back to where we started before *Furman*.¹²

We submit that the Supreme Court of Ohio in this case and in others has provided that the statutory grounds for mitigation shall "be liberally construed in favor of the accused." (Appendix 142).

The statute itself specifically provides that the Court shall consider "the nature and circumstances of the offense and the history, character, and condition of the offender."¹³

As will be reflected in this portion of our brief, Ohio has set up guidelines which are broadly construed in favor of the offender so as to individualize the sentence to the offender and thereby assure that the sentence will not be imposed in an arbitrary or capricious manner.

¹² *Furman v. Georgia*, 408 U.S. 238 (1972).

¹³ Ohio Revised Code 2929.04(B).

A. THE OHIO CAPITAL PUNISHMENT STATUTES ARE NEITHER NARROW NOR RIGID AND THEY DO NOT AFFRONT THE CONSTITUTIONAL PRINCIPLES FORBIDDING MANDATORY SENTENCES.

We would like to state at the very outset that the Ohio death penalty statutes are not mandatory as the defendant-petitioner's counsel would indicate on his subparagraph a of part one of his brief.

It is to be noted that counsel even concedes that the Ohio death penalty statute is not mandatory in his brief.¹⁴

As this court stated in *Gregg v. Georgia*, 428 U.S. 169 at page 175:

"In assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests upon those who would attack the judgment of the representatives of the people."

Thus, this Court has stated that the death penalty in and of itself is not unconstitutional and as long as the penalty selected is not cruelly inhumane or disproportionate to the crime it is constitutional.

The death penalty in Ohio can only be inflicted for a person who has caused the death of another and who has been found guilty of one of the specific aggravating specifications beyond a reasonable doubt.

¹⁴ "While the Ohio death penalty is not absolutely mandatory, Ohio's capital statutes are 'unduly harsh and unworkably rigid'." (Brief of Petitioner 19.)

We then come to the question of whether the Ohio death penalty is cruelly inhumane. This Court in *Woodson v. North Carolina*, 428 U.S. 280 (1976), in effect stated that a mandatory death penalty without the ability of any type of mitigation procedure and without the ability to temper and individualize the sentence was unconstitutional.

We submit that the Ohio statute is not mandatory (conceded by the petitioner's brief) nor is it so narrow or rigid as to affront the constitutional guarantees of the Eighth and Fourteenth Amendments to the United States Constitution.

This Court gave its general approval to a bifurcated procedure separating the determination of guilt from the sentencing procedure.¹⁵

Ohio has such a bifurcated system. In the guilt finding portion of the case the state must show that there was a murder committed in the limited specified types of cases and must prove beyond a reasonable doubt one or more of the specifications.¹⁶

The Ohio Legislature provided for a situation that meets one of the tests in which this Court determined the Georgia law to be constitutional.

We do not believe there is any question relative to the aggravating specifications of the Ohio statute in specific types of murder cases only passing constitutional scrutiny.

¹⁵ "When human life is at stake and when the jury must have information prejudicial to the question of guilt but relevant to the question of penalty in order to impose a rational sentence, A BIFURCATED SYSTEM IS MORE LIKELY TO ENSURE ELIMINATION OF CONSTITUTIONAL DEFICIENCIES IDENTIFIED IN *FURMAN*." *Gregg v. Georgia*, 428 U.S. 169.

(Capitalization ours for emphasis.)

¹⁶ Ohio Revised Code 2920.03(B).

In fact, in Georgia, the jury is permitted to consider any aggravating circumstance. This goes well beyond the limitations placed on this type of a crime by the Ohio legislature.

Referring to the Georgia statute which is similar to Ohio's bifurcated trial this Court held on page 206 of the *Gregg* case (ibid):

"While the jury is permitted to consider any aggravating or mitigating circumstance, it must find and identify at least one statutory aggravating factor before it may impose a penalty of death.

In this way the jury's discretion is channelled. No longer can a jury wantonly and freakishly impose the death sentence, it is always circumscribed by the Legislative guidelines."

As this Court held in *Proffitt v. Florida*, 428 U.S. 242 at page 258:

"While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of *Furman* are satisfied when the sentencing authorities' discretion is guided by requiring examination of specific factors that argue in favor of or against the imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition."

We then must turn our attention to the Ohio statutes and the matters to be raised by way of mitigation. In order to insure uniform guidelines and equal evenhanded justice in the administration of those guidelines the state statute sets up certain requirements and guidelines for the mitigation hearing.

First of all, the state requires that the Court obtain a presentence investigation of the defendant with copies of

said report being furnished to the prosecutor and either the defendant or his attorneys.¹⁷

In addition to the presentence report, the statute requires the Court to obtain a psychiatric examination of the defendant with copies of said report being furnished to both the prosecutor and either the defendant or his attorneys.¹⁸

Thus it can be seen that the defendant does not have to do a thing and the Court is required by law to individualize the sentence for the crime for which the defendant has already been found guilty.

The Court is also required to hear other testimony, if offered. In fact, the statute is so broad as to permit the defendant to orally make a statement or testify without being required to swear to said statement and he is not even subject to cross-examination by the prosecutor.¹⁹

We then go to the statute specifically spelling out the mitigation process. This statute provides that regardless of the proof of the defendant's guilt beyond a reasonable doubt of the crime and his guilt of one or more of the listed aggravated specifications beyond a reasonable doubt, the death penalty "is precluded when, considering the nature and circumstances of the offense and the history and character, and condition of the offender, one or more of the following is established by a preponderance of the evidence.

- (1) The victim of the offense induced or facilitated it.

¹⁷ Ohio Revised Code 2929.03(D).

¹⁸ Ohio Revised Code 2929.03(D).

¹⁹ "... if the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation." Ohio Revised Code 2929.03(D).

- (2) It is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion, or strong provocation.
- (3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.²⁰

We find it somewhat difficult to fully understand and respond to the petitioner's arguments with regard to the above-mentioned mitigating circumstances.

One of the basic objections to the death penalty statutes before *Furman*²¹ was the unbridled, unchanneled discretion, without guidelines, that trial Courts could use to impose the death penalty.

We find that the petitioner's argument that the Ohio statutes do not permit discretion to extend mercy without guidelines is one of the basic reasons why the statute is constitutional.

As this Court stated in the *Proffitt*²² case, the requirement that the sentencing authority examine specific mitigating factors that argue against the imposition of the death penalty, eliminates the arbitrariness and capriciousness in the imposition of said penalty.²³

If we have unbridled, unchallenged discretion in granting mercy, how can the Courts compare one sentence as against another? There must be some uniformity or guide-

²⁰ Ohio Revised Code 2929.04(B).

²¹ *Furman v. Georgia*, 408 U.S. 238.

²² *Proffitt v. Florida*, 428 U.S. 242.

²³ *Proffitt v. Florida*, 428 U.S. 242 at p. 258.

lines. Absent these guidelines, we are right back where we were before *Furman*²⁴

We then look to the guidelines themselves.

The first specific mitigating factor is:

"The victim of the offense induced or facilitated it."

Counsel for petitioner reflects that "except in the rarest and most improbable factual situations" will this mitigating factor ever be appropriately applied. We are not certain as to how many defendants have or have not escaped the death penalty by way of this specification of mitigation in the trial Courts, but we are aware of the fact that two defendants owe their lives to a Court of Appeals reversing their death sentences because of it. Counsel for petitioner appears to equate the mitigating factors to the guilt factors which we believe to be an improper conclusion on his part.

As the Court of Appeals for the Fifth Appellate District of Ohio in the cases of *State v. Hines*, CA 634, and *State v. Lucas*, CA 639, in unreported decisions released on February 25, 1977, stated with regard to this first item of mitigation:

"We note at the outset that the above mitigating circumstance (s) is unlike the second and third in that here the emphasis is on the victim rather than the offender. In short, the 'induce or facilitate' provision provides for mitigating, i.e., lessening the seriousness of the crime because of the conduct of the victim We thus conclude that the legislative intent expressed in R.C. 2929.04 (B) (1) is limited to unlawful conduct on the part of the victim which induces or facilitates the offense."

²⁴ *Furman v. Georgia*, 408 U.S. 238.

The Fifth District Court of Appeals then quoted from *State v. Woods*, 48 O.S. (2d) 127 at page 137, in which that Court stated:

"This definition appropriately allows consideration of the broad range of information relevant to mitigation set out in R.C. 2929.04, including 'the nature and circumstances of the offense and the history, character, and condition of the offender.' It also corresponds, as well perhaps as any definition, to the essential purpose of any hearing upon mitigation. The question at that stage is not guilt, for guilt has already been determined. Nor is it primarily whether the standards of conduct imposed by the criminal law have been upheld in order to express society's disapproval of the criminal act and to deter others, for those goals too are largely accomplished by the verdict. Rather the purpose of mitigation is to recognize that the punishment assigned for a criminal act may, for ethical and humanitarian reasons, be tempered out of consideration of the individual offender and his crime. As the United States Supreme Court has said: ' * * * The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. This whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions * * * ' *Williams v. New York* (1949), 337 U.S. 241, 247.

Construing R.C. 2929.04 (B) liberally in favor of the accused, we think that the standard stated is appropriate for the trial judge or judges to apply to the facts presented at the mitigation hearing including the nature and circumstances of the offense and the history, character and condition of the defendant, in making the determination of whether a sentence of death should be reduced to life imprisonment because

of duress or coercion . . .” (The 5th District Court of Appeals underlined those above portions for emphasis).

They then stated in their opinions:

“We construe this language to mean that the issue of whether the mitigating condition has been established by a preponderance of the evidence must not be considered in a vacuum but rather shall be weighed in conjunction with the nature and circumstances of the offense as well as the history, character, and condition of the defendant.”

The Court of Appeals then affirmed the judgment of conviction but reversed the death sentence to a life sentence.

Thus we see, as to the first mitigating factor, that there are broad general guidelines to apply and they have actually been applied on appeal by an upper Ohio appellate Court as to two defendants.

The second mitigating factor is:

“It is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion or strong provocation.”²³

We believe that we can have no better determination of the second mitigating factor than to quote the Ohio Supreme Court in the case of *State v. Woods*, 48 O.S. 2d 127 at pages 134, 135, 136 and 137 in which that Court held:

“The question is whether this evidence was sufficient to justify mitigation of sentence. R.C. 2929.04 (B) provides that the death penalty:

. . . . is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of

²³ Ohio Revised Code 2929.04(B)(2).

the following is established by a preponderance (sic) of the evidence:

. . . .

2. It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

THIS LANGUAGE MUST BE STRICTLY CONSTRUED AGAINST THE STATE AND LIBERALLY CONSTRUED IN FAVOR OF THE ACCUSED. R.C. 2901.04(A).

In construing and applying the words ‘duress’ and ‘coercion,’ WE MUST NOTE FIRST THAT THOSE TERMS WOULD BE A VIRTUAL NULLITY IF THEY WERE TAKEN TO APPLY TO THE LEGAL STANDARD FOR DURESS AS A DEFENSE TO A CRIMINAL charge.

In the case of the most common type of aggravated murder, purposely causing death in connection with certain felonies, if the defendant has a valid defense of duress to the underlying crime, he can, at most, be convicted of the murder itself, not of aggravated murder, and he would not then be subject to the death penalty. Accordingly, TO HAVE ANY EFFECTIVE MEANING, THE TERMS ‘DURESS’ AND ‘COERCION’ IN R.C. 2929.04(B) MUST BE CONSTRUED, IF POSSIBLE, MORE BROADLY THAN WHEN USED AS A DEFENSE IN CRIMINAL CASES. This is particularly true since the defendant is required to establish duress or coercion by a preponderance of the evidence for purposes of mitigation, whereas during trial, he is required only to present evidence sufficient to raise such an affirmative defense, and the burden of disproving it beyond a reasonable doubt remains with the prosecution. *State v. Robinson* (1976), 47 Ohio St. 2d 103, 351 N.E. 2d 88.

THE CONCEPTS OF DURESS AND COERCION ARE ALSO FOUND IN CIVIL LAW AND

HAVE BROADER MEANING. THE APPLICATION OF THOSE CONCEPTS VARIES GREATLY, AND TURNS LARGELY UPON THE CIRCUMSTANCES OF EACH INDIVIDUAL CASE, INCLUDING THE CHARACTER OF THE ONE SOUGHT TO BE INFLUENCED. As this court held in *Tallmadge v. Robinson* (1952), 138 Ohio St. 333, 109 N.E. 2d 496, paragraph two of the syllabus:

'In determining whether a course of conduct results in duress, the question is not what effect such conduct would have upon an ordinary man but rather THE EFFECT UPON THE PARTICULAR PERSON TOWARD WHOM SUCH CONDUCT IS DIRECTED, AND IN DETERMINING SUCH EFFECT THE AGE, SEX, HEALTH AND MENTAL CONDITION OF THE PERSON AFFECTED, THE RELATIONSHIP OF THE PARTIES AND ALL THE SURROUNDING CIRCUMSTANCES MAY BE CONSIDERED.'

Duress usually connotes some degree of force or threat of force, but duress has also been found when the conduct of one person induces another to enter into a contract against his own volition or judgment, generally out of fear, but also in some cases because of extreme persuasion or pressure of circumstances. 13 Williston on Contracts (3 Ed.), Section 1608. Coercion is generally defined more broadly to include undue influence and other lesser forms of compulsion. It has been said that:

'The words "coercion" and "duress" are not synonymous, although their meanings often shade into one another. "Duress" generally carries the idea of compulsion, either by means of actual physical force or threatened physical force applied to the person (or to some near relative of the person) to be influenced, or applied to the property or reputation of such person. "Coercion" may include a compulsion brought about

by moral force or in some other manner with or without physical force.'

....

These judicial definitions of coercion correspond to the common use of the word. Webster's Third New International Dictionary defines coercion as 'the act of coercing: use of physical or moral force to compel to act or assent,' and to coerce as 'to restrain, control or dominate, nullifying individual will or desire (as by force, power, violence, or intimidation).'

The essential characteristic of coercion which emerges from these definitions is that force, threat of force, strong persuasion or domination by another, necessitous circumstances, or some combination of those, has overcome the mind or volition of the defendant so that he acted other than he ordinarily would have acted in the absence of those influences.

THIS DEFINITION APPROPRIATELY ALLOWS CONSIDERATION OF THE BROAD RANGE OF INFORMATION RELEVANT TO MITIGATION SET OUT IN R.C. 2929.04, INCLUDING 'THE NATURE AND CIRCUMSTANCES OF THE OFFENSE AND THE HISTORY, CHARACTER, AND CONDITION OF THE OFFENDER.' It also corresponds, as well perhaps as any definition, to the essential purpose of any hearing upon mitigation. The question at that stage is not guilt, for guilt has already been determined. Nor is it primarily whether the standards of conduct imposed by the criminal law have been upheld in order to express society's disapproval of the criminal act and to deter others, for those goals too are largely accomplished by the verdict. RATHER, THE PURPOSE OF MITIGATION IS TO RECOGNIZE THAT THE PUNISHMENT ASSIGNED FOR A CRIMINAL ACT MAY, FOR ETHICAL AND HUMANITARIAN REASONS, BE TEMPERED OUT OF CONSIDERATION OF THE INDIVIDUAL

OFFENDER AND HIS CRIME. As the United States Supreme Court has said:

'* * * The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. This whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions * * *.' *Williams v. New York*, (1949), 337 U.S. 241, 247.

CONSTRUING R.C. 2929.04 (B) LIBERALLY IN FAVOR OF THE ACCUSED, WE THINK THAT THE STANDARD STATED IS APPROPRIATE FOR THE TRIAL JUDGE OR JUDGES TO APPLY TO THE FACTS PRESENTED AT THE MITIGATION HEARING, INCLUDING THE NATURE AND CIRCUMSTANCES OF THE OFFENSE AND THE HISTORY, CHARACTER AND CONDITION OF THE DEFENDANT, IN MAKING THE DETERMINATION OF WHETHER A SENTENCE OF DEATH SHOULD BE REDUCED TO LIFE IMPRISONMENT BECAUSE OF DURESS OR COERCION."

(Capitalization ours for emphasis.)

Thus it can readily be seen that the Ohio Supreme Court has substantially broadened the definition of coercion and duress and each is individualized to the nature and circumstances of the case, the history, character and condition of the defendant.

The Supreme Court has also directed that the language in the mitigation statute must be strictly construed against the state and liberally construed in favor of the accused.

Thus we have a guideline which is broadly construed against the state and in favor of the defendant and which is tempered to the individual defendant on an individualized basis.

The third mitigating factor to be considered by the trial judge in the mitigation hearings is:

"The offense was primarily the product of the offenders psychosis or mental deficiency though such condition is insufficient to establish the defense of insanity."

The Supreme Court of Ohio in the case of *State v. Bayless*, 48 O.S. (2d) 73 at page 96 defined the term mental deficiency as that term is used in the mitigation process. They held that:

"Mental deficiency is consistently defined to mean a low or defective state of intelligence, construing the term broadly, a deficiency may be severe or mild and may be hereditary or caused by a brain defect, disease, or injury, or by whatever other conditions might cause subnormal intelligence."

The Supreme Court of Ohio then in the case of *State v. Black*, 48 O.S. (2d) 262 (1976) at page 268 went on to broaden the definition of this section of the code and stated:

"(3) The offense was primarily the product of the offender's *psychosis* or *mental deficiency*, though such condition is insufficient to establish the defense of insanity. (Emphasis added.)

It is clear that the General Assembly chose the emphasized language to allow the trial judge or panel the broadest possible latitude in the examination of the defendant's mental state and mental capacity for the purpose of the mitigation inquiry, excepting only legal insanity, the existence of which would have absolved the defendant from criminal responsibility for his crime. Thus, BROADLY DEFINED AND HOWEVER EVIDENCED, ANY MENTAL STATE OR INCAPACITY MAY BE CONSIDERED IN LIGHT

OF ALL THE CIRCUMSTANCES AND INCLUDING THE NATURE OF THE CRIME ITSELF SO THAT IT MAY BE DETERMINED WHETHER THE CONDITION FOUND TO HAVE EXISTED WAS THE PRIMARY PRODUCING CAUSE OF THE OFFENSE. To define terms such as those used in the statute is to narrow them.

It has often been charged that our definition of legal insanity is too narrowly defined. For the appellant to claim that the mental state for purposes of the mitigation hearing also needs to be so defined, is to bind the conscience of the trial court initially, and of the appellate court and this court on review. The language used has a saving grace, for it will permit the examination of the mental state of the offender, whether juvenile, adolescent or adult, in light of the offense, the offender, and all of the circumstances of the crime, for the purpose of reaching a decision on humane grounds as to whether society needs to exact the ultimate penalty."

(Capitalization ours for emphasis.)

The Supreme Court of Ohio in speaking on the question of mental deficiency stated in this case at page 280 (Appendix 140):

"However, WE DO NOT AGREE THAT A MINOR IS PER SE 'MENTALLY DEFICIENT' WITHIN THE MEANING OF R.C. 2929.04 (B) (3). Such an intention by the General Assembly could have easily been provided for by clear and simple language. Upon review of the statute, we do not believe the General Assembly intended that a 17-year old defendant is conclusively 'mentally deficient.' The ninth proposition of law is overruled."

(Capitalization ours for emphasis.)

The Ohio Supreme Court went on to say in this case at page 281 (Appendix 141):

"It has been alleged that the mitigating circumstances under R.C. 2929.04 (B) are unconstitutionally narrow because a number of very important factors, such as the age and criminal record of the defendant, appear to be irrelevant under the statute. We believe, however, that the Ohio statutory scheme can withstand this attack. The Ohio statutes, properly construed, permit the trial judge or panel to consider these factors at the mitigation hearing. Such a statutory construction is evident as R.C. 2929.04 (B) states that 'THE DEATH PENALTY * * * IS PRECLUDED WHEN, CONSIDERING THE NATURE AND CIRCUMSTANCES OF THE OFFENSE AND THE HISTORY, CHARACTER, AND CONDITION OF THE OFFENDER' (emphasis added), ONE OR MORE OF THE MITIGATING CIRCUMSTANCES IS ESTABLISHED. THIS CONCLUSION IS BUTTRESSED BY THE REQUIREMENT THAT THESE STATUTORY PROVISIONS BE LIBERALLY CONSTRUED IN FAVOR OF THE ACCUSED."

(Capitalization ours for emphasis.)

They concluded their remarks with a statement at page 282 (Appendix 142):

"WHILE REJECTING APPELLANT'S CLAIM THAT A MINOR DEFENDANT IS PER SE 'MENTALLY DEFICIENT' WE DO HOLD THAT A DEFENDANT'S AGE IS A PRIMARY FACTOR IN DETERMINING THE EXISTENCE OF A MENTAL DEFICIENCY. SENILITY, AS WELL AS MINORITY, MAY WELL BE RELEVANT, AND THEREFORE PROPERLY CONSIDERED, IN DETERMINING WHETHER THE OFFENSE WAS A PRODUCT OF MENTAL DEFICIENCY."

(Capitalization ours for emphasis.)

We believe that a full and complete interpretation of the Ohio Statutes relative to the death penalty as reflected by

the Legislature and interpreted by the Court clearly reflects that the Ohio statutes are broad and general enough so that they do not affront the constitutional principles of mandatory sentences. The guidelines set up by the legislature, and their judicial interpretations, provide for the even handed administration of justice and avoid the arbitrary and capricious imposition of the death penalty.

B. THE CHARACTER AND THE RECORD OF THE OFFENDER ARE A MEANINGFUL PART OF THE MITIGATION PROCESS IN CAPITAL CASES IN OHIO.

This general title is in response to the allegation by counsel for the petitioner that Ohio statutes preclude the meaningful consideration of the character and record of the offender. We strongly disagree with this interpretation by the petitioner.

First of all, if we look to the statute itself it says:

“... the death penalty is precluded. When, considering the nature and circumstances of the offense and the HISTORY, CHARACTER, AND CONDITION of the offender...”²⁶

(Capitalization ours for emphasis.)

As the Supreme Court of Ohio held in this very case and as reflected on page 141 and 142 of the appendix:

“It has been alleged that the mitigating circumstances under Revised Code 2929.04 (B) are unconstitutionally narrow because a number of very important factors such as age and criminal record of the defendant ap-

²⁶ Ohio Revised Code 2929.04(B).

pear to be irrelevant to the statute. We believe, however, that the Ohio statutory scheme can withstand this attack. The Ohio statutes, properly construed, permit the trial judge or panel to consider these factors at the mitigation hearing. Such a statutory construction is evident as Revised Code 2929.04 (B) states that the death penalty . . . is precluded when, considering the nature and circumstances of the offense *and the history, character, and condition of the offender* (emphasis added), one or more of the mitigating circumstances is established. This conclusion is buttressed by the requirement that these statutory provisions be liberally construed in favor of the accused.”

We respectfully submit that we doubt how the Court could have spoken out stronger.

The statute provides for the consideration of the history, character and condition of the defendant. The Supreme Court says that this is a mandatory requirement of the statute and further states that this requirement must be construed in favor of the accused.

We submit that the guidelines have been established by the statute and the Supreme Court's interpretation of that statute. We further submit that the lower trial courts in Ohio are carrying out the mitigation hearings under those guidelines. It is our belief that a number of defendants have had the benefit of this interpretation.

To name just one, we refer to the case of *The State of Ohio v. William Bell Mascus*²⁷ in which the trial court judge stated:

“The determination that I have to make is whether considering THE NATURE AND CIRCUMSTANCES OF THE OFFENSE AND THE HIS-

²⁷ An unreported decision by the Court of Common Pleas (trial court) of Hamilton County, Ohio rendered September 2, 1976.

TORY, CHARACTER AND CONDITION OF THE OFFENDER it has been established by a preponderance of the evidence that the offense was primarily the product of the offender's psychosis or mental deficiency, though such deficiency is unable to establish the defense of insanity."

(Capitalization ours for emphasis.)

In its conclusion the trial judge in the *Mascus* case stated:

" I can't envision a person like Mascus KNOWING ALL THAT I KNOW ABOUT HIM, AND THE PARTICIPATION IN A CRIME SUCH AS WAS HIS PARTICIPATION IN A CRIME, THE CHARACTERIZATION OF THE CODEFENDANT SUCH AS WERE THE CHARACTERIZATIONS OF THIS CODEFENDANT, and reports such as we have gotten"

(Capitalization ours for emphasis.)

The trial court in the *Mascus* case then went on to determine that, based on the above, the mitigating factor was shown and the death penalty was set aside.

I submit the above case to the court not to reflect that it is of great importance or that other courts lower than the Common Pleas Court are following the pronouncements of that court,²⁸ but rather to show that the pronouncements of the statute and the Ohio Supreme Court are being carried out by the lower trial courts in individualizing the sentence to the offender and in guaranteeing the even handed administration of the death penalty proceedings and sentence in this state.

²⁸ There are no lower trial courts in Ohio to try a capital offense.

As the Fifth District Court of Appeals held in the cases of *State v. Hines*²⁹ and *State v. Lucas*:³⁰

"We construe this language (referring to *State v. Woods*, 48 O.S. (2d) 127 at page 137 (1976)³¹ to mean that the issue of whether the mitigating condition has been established by a preponderance of the

²⁹ *State v. Hines*, Fifth District Court of Appeals of Ohio case No. C A 634. (Decision rendered February 25, 1977 and unreported).

³⁰ *State v. Lucas*, Fifth District Court of Appeals of Ohio case No. C A 639. (Decision rendered February 25, 1977 and unreported).

³¹ "THIS DEFINITION APPROPRIATELY ALLOWS CONSIDERATION OF THE BROAD RANGE OF INFORMATION RELEVANT TO MITIGATION SET OUT IN R. C. 2929.04, INCLUDING 'THE NATURE AND CIRCUMSTANCES OF THE OFFENSE AND THE HISTORY, CHARACTER, AND CONDITION OF THE OFFENDER.' It also corresponds, as well perhaps as any definition, to the essential purpose of any hearing upon mitigation. The question at that stage is not guilt, for guilt has already been determined. Nor is it primarily whether the standards of conduct imposed by the criminal law have been upheld in order to express society's disapproval of the criminal act and to deter others, for those goals too are largely accomplished by the verdict. Rather, THE PURPOSE OF MITIGATION IS TO RECOGNIZE THAT THE PUNISHMENT ASSIGNED FOR A CRIMINAL ACT MAY, FOR ETHICAL AND HUMANITARIAN REASONS, BE TEMPERED OUT OF CONSIDERATION OF THE INDIVIDUAL OFFENDER AND HIS CRIME. As the United States Supreme Court has said: ' . . . The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. This whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions' *Williams v. New York* (1949), 337 U.S. 241, 274.

Construing R.C. 2929.04 (B) liberally in favor of the accused, we think that the standard stated is appropriate for the trial judge or judges to apply to the facts presented at the mitigation hearing, INCLUDING THE NATURE AND CIRCUMSTANCES OF THE OFFENSE AND THE HISTORY, CHARACTER AND CONDITION OF THE DEFENDANT, in making the determination of whether a sentence of death should be reduced to life imprisonment because of duress or coercion."

(Capitalization ours for emphasis.)

evidence must not be considered in a vacuum but rather shall be weighed in conjunction with the NATURE AND CIRCUMSTANCES OF THE OFFENSE AS WELL AS THE HISTORY, CHARACTER AND CONDITION OF THE DEFENDANT.

.....

As for the history, character and condition of Hines and Lucas, they emerge as self indulged, drug oriented youthful failures of marginal intelligence but with no history or pattern of violence."

(Capitalization ours for emphasis.)

The death penalty was then set aside by the Fifth District Court of Appeals of the State of Ohio as to both defendants.

As can be seen, both the Ohio Court of Appeals and the trial courts are giving meaningful consideration to the history, character, and condition of the defendant in the conducting of the death penalty mitigation hearings and in the sentencing thereunder.

C. THE MITIGATING FACTORS TO BE CONSIDERED BY THE TRIAL COURT IN CAPITAL CASES IN OHIO ARE BROAD AND GENERAL ENOUGH SO AS TO INSURE THAT THE DEATH PENALTY WILL NOT BE IMPOSED IN AN ARBITRARY OR CAPRICIOUS MANNER.

As the Court held in *Gregg v. Georgia*³² at page 195:

"In summary, the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority has adequate information and guidance."

This Court went on to say in the same case that they were not limiting the sentencing factors to those before them in the *Gregg* case but that they will examine each system on an individualized basis.³³

In the *Gregg* opinion this Court recognized the difficulty in setting standards to guide a capital jury's sentencing deliberations but further pointed out that the Model Penal Code had set forth guidelines.³⁴

The guidelines set up by the Model Penal Code and reflected in this Courts opinion are:

- (1) The defendant has no significant history of prior criminal activity.
- (2) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

³² *Gregg v. Georgia*, 428 U.S. 153 (1976).

³³ *Gregg v. Georgia*, 428 U.S. 153 (1976) at page 195.

³⁴ *Gregg v. Georgia*, 428 U.S. 153 (1976) at page 193 and 194.

- (3) The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
- (4) The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation of his conduct.
- (5) The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor.
- (6) The decedent acted under duress or under domination of another person.
- (7) At the time of the murder, the capacity of the defendant to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of the law was impaired as a result of mental disease or defect or intoxication.
- (8) The youth of the defendant at the time of the crime.

In light of the fact that we are discussing the constitutionality of the Ohio mitigation and sentencing procedures; we will direct our arguments to the generalized procedure and generalized mitigating factors and respond specifically as to the particular defendant William Bell under Section D of this argument.

We will take each of the mitigating factors as set forth by the Model Penal Code and show how it has been adopted in the Ohio mitigation hearing.

The first mitigating factor in the Model Penal Code is that the defendant has no significant history of prior criminal activity. The Ohio statute specifically requires the Court to consider the history of the offender.

The second mitigating factor in the Model Penal Code is that the murder was committed under the influence of extreme mental or emotional disturbance. This is covered by the Ohio statute when it requires the sentencing judge to consider "The nature and circumstances of the offense" and "the character and condition of the offender" and "the offense was primarily the product of the offenders psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity".

The third mitigating factor in the Model Penal Code is that the victim was a participant or consented to the defendant's homicidal conduct. This is clearly covered under the Ohio statute and mitigating factor that says "the victim of the offense induced or facilitated it". This would also be covered under the Ohio statute in so far as "the nature and circumstances of the offense".

The fourth mitigating factor in the Model Penal Code is that the murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation of his conduct. This clearly would be covered in Ohio with regard to the "history, character, and condition of the offender" coupled with the "offenders psychosis".

The fifth mitigating factor in the Model Penal Code was that the defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor. This clearly is covered in the Ohio statute in the "nature and circumstances of the offense".

The sixth mitigating factor in the Model Penal Code is that the defendant acted under duress or under the domination of another person. This is also covered by the Ohio statute which in addition to "the history, character

and condition of the offender" provides the mitigating factor that "it is unlikely that the offense would have been committed, but the fact that the offender was under duress, coercion, or strong provocation".

The seventh mitigating factor in the Model Penal Code is the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired as a result of a mental disease or defect or intoxication. This also is clearly covered by Ohio's third mitigating factor on "psychosis or mental deficiency" which "condition is insufficient to establish the defense of insanity"; coupled with the "history, character and condition of the offender".

The eighth and final factor in the Model Penal Code is the youth of the defendant at the time of the crime. The Ohio Supreme Court addressed this issue in this case when it said in its opinion (Appendix 142):

"we do hold that a defendant's age is a primary factor in determining the existence of a mental deficiency."

Thus, the Supreme Court of Ohio does not recognize the age of the offender; in and of itself as being a mitigating factor, but does recognize it as a very important element in determining the existence of a mental deficiency in conjunction with the history, character and condition of the offender.

Thus it can be seen that Ohio legislature has specifically covered practically every item or factor of mitigation as set forth by the drafters of the Model Penal Code.

As this Court stated in the *Gregg* case³⁵ at page 175:

"... in assessing a punishment selected by a democratically elected legislature against the constitutional

³⁵ *Gregg v. Georgia*, 428 U.S. 153 (1976).

measure, WE PRESUME ITS VALIDITY. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And A HEAVY BURDEN RESTS ON THOSE WHO WOULD ATTACK THE JUDGMENT OF THE REPRESENTATIVES OF THE PEOPLE." (Capitalization ours for emphasis)

We are not suggesting that just because the legislature enacted the Ohio capital punishment statute the way it did; that that makes it constitutional. What we are saying is that the elected representatives of the people drafted and adopted the Ohio statute and that it is our belief that the portion of the Ohio capital punishment statute involving mitigation sets forth sufficient broad and general guidelines requiring examination of many specific factors and thus eliminating arbitrariness and capriciousness in the imposition of the death penalty.

As this Court stated in *Proffitt v. Florida*,³⁶ at page 258:

"While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of *Furman* ARE SATISFIED WHEN THE SENTENCING AUTHORITY'S DISCRETION IS GUIDED AND CHANNELLED BY REQUIRING EXAMINATION OF SPECIFIC FACTORS THAT ARGUE IN FAVOR OF OR AGAINST IMPOSITION OF THE DEATH PENALTY, THUS ELIMINATING TOTAL ARBITRARINESS AND CAPRICIOUSNESS IN ITS IMPOSITION."

(Capitalization ours for emphasis.)

³⁶ *Proffitt v. Florida*, 428 U.S. 242 (1976).

If we look at the Texas statute which this Court upheld we find a substantial absence of the many mitigating factors which the Ohio system provides.

We therefore submit that the Ohio statutes provide specific guidelines directing and channelling the judges attention to specific mitigating factors, which are broad and general enough, so that the imposition of the death penalty will not be done in an arbitrary or capricious manner.

The seventh test under the Model Penal Code is that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired as a result of mental disease or defect or intoxication. We submit that the evidence clearly reflected the petitioner did not qualify under any of these mitigating factors. There was absolutely no evidence of a mental disease or defect.

In the pretrial psychiatric report the doctors reflected that the defendant was hedging as to the facts but then gave them a statement. They further indicated that "his perceptions were not distorted and there was no evidence from his history that he was having hallucinations or any other drug effect". (Appendix 39). They further "indicated that he was in contact with reality and his thought processes were clear, logical coherent". (Appendix 39). They further indicated in the pre-trial psychiatric report that the petitioners I.Q. at that time was measured at 90. However, in the psychiatric report presented at the mitigation hearing the defendant-petitioner had an I.Q. of 110 to 120. (Appendix 44).

We do concede that the defendant himself in an unsworn statement at the mitigation hearing and not subject to cross-examination stated that on the night of the brutal murder he took Mescaline and smoked some marijuana at the community center long before the murder (Ap-

pendix 76 and 79). He further indicated that the relaxed feeling from the Mescaline and marijuana lasted "about two or three hours" (Appendix 79). However, there was no testimony that the defendant-petitioner had taken any drugs or smoked marijuana after that which he allegedly took at the Community Center. It is the respondents belief that even if we take the facts as submitted by the petitioner to be true; it would have taken at least two or three hours to perpetrate the crimes, and thus the alleged effect of the drug would have been dissipated. It is also to be noted that the three Court appointed psychiatrists unanimously agreed that the petitioner had no perceptual distortions at the time the offense was committed. It is to be noted that the petitioner drove Samuel Hall's brothers' car back to the brother after the kidnapping. He drove the decedents car with the decedent still alive in the trunk out to the isolated area. He parked the car with trunk away from the road so that the trunk was furthest from the road. He then drove the stolen car to Dayton where he and his accomplice Hall the next morning kidnapped a second victim in the same manner as they had just done earlier to the decedent. We concede that certain of his teachers believed him to have a lackadaisical attitude; but none of them thought it serious enough to either keep him from school or to get outside assistance for him.

We therefore submit that the defendant would not qualify even under the seventh category of the Model Penal Code listing of items of mitigation.

The final item in the Model Penal Code is the youth of the defendant at the time of the crime. At the time that the crime was committed the defendant was 16 going on 17. We will concede that if the age of the defendant but anything more is to be considered as a mitigating

factor then the Ohio statute would fail. We also believe that the Florida, Georgia and Texas statutes would also fail if this were the sole and only factor and not related to anything else. The Ohio Supreme Court in this case has rejected such a contention in its opinion in this case. We concur with said Court in its interpretation. Otherwise we would have a pronouncement that irrespective of the brutality of the crime and irrespective of the defendant's participation therein and irrespective of the defendant's prior record; he could not get a death penalty sentence. We do not feel that based on this Courts decisions in this area to date that the age of the defendant, unrelated to anything else, should be the determinative mitigating factor. We are more inclined to adopt the opinion of the Ohio Supreme Court when it said:

"While rejecting appellant's claim that a minor defendant is per se 'mentally deficient', we do hold that a defendants age is a primary factor in the determination of a mental deficiency." (Appendix 142)

We therefore submit that based on the evidence presented; even under the Model Penal Code the defendant has not reflected any mitigating factors which would eliminate the death penalty.

The second part of the defendant-petitioner's argument in the death penalty cases goes to the question of capital punishment for the non triggerman, or aider and abettor or accomplice.

We thoroughly disagree with the petitioner's argument that the death penalty for a non triggerman today is virtually extinct. Before we even get to this proposition we respectfully submit that there was substantial credible evidence that the petitioner was the actual culprit who killed the decedent.

The Court of Appeals of the First Appellate District of Ohio specifically addressed this question when they stated in their opinion that there was substantial credible evidence to show Bell's participation in the killing.

The Court of Appeals of the First Appellate District of Ohio went on to explain in great detail the petitioners participation in the brutal murder of the decedent.³⁷

That Court stated:

"Evidence of bruises about the body of Graber, the comment of Bell to Hall, the physical circumstances surrounding the slaying, and the testimony of Pierce, all would have justified the trier of fact in disregarding Bell's version of the killing, and in concluding THAT BELL EITHER COMMITTED or, actively assisted Hall in MURDERING THE VICTIM . . .

. . . . We hold that the COURT DID NOT ERR IN DETERMINING BELL'S GUILT either AS A PRINCIPLE IN THE MURDER, or as an aider and abettor in the slaying; the evidence is sufficient to sustain either theory."

(Capitalization ours for emphasis) (Appendix 159 and 160).

The Court of Appeals of the First Appellate District of Ohio pointed out in their opinion; the defendant Bell clearly knew what was going on and that he was driving the car to a desolated spot solely for the purpose of killing the decedent.³⁸

³⁷ *State v. Bell*, No. C-75068 (1976) unreported and reported in Appendix at pages 158 through 160.

³⁸ "Had simple robbery been the principal motive, the circumstances of the trios presence in the cemetery would have been without purpose and the slaying utterly pointless; these facts could not have escaped Bell's attention." *State v. Bell*, (Appendix 159 and 160).

The Supreme Court in its review also reflected that there was sufficient evidence to prove the defendant guilty either as the principle offender or an aider and abettor (Appendix 139).

For the purpose of the record it should be noted that the indictment charged the petitioner as one of the principle offenders and he was convicted under Ohio law as charged in said indictment.

Thus, for the purposes of the record before this Court; the defendant Willie Lee Bell has been convicted as the principle offender in the death of the decedent.

Even if we were to consider the question of aider and abettor, accomplice or coconspirator we still think the Ohio statute would pass constitutional scrutiny by this court.

It is to be noted that the prelude to the mitigation proceeding provides "the death penalty is precluded when considering THE NATURE AND CIRCUMSTANCES OF THE OFFENSE" (Capitalization ours for emphasis)

The Supreme Court of Ohio has specifically reflected that they will consider the nature and circumstances of the offense and the history, character and condition of the offender.³⁹

Counsel for the petitioner reflects that the death penalty is virtually extinct in so far as non triggermen are concerned. With this proposition we strongly disagree.⁴⁰

³⁹ *State v. Bell*, 48 O.S. (2d) 270 (1976) (Appendix 141 and 142).

⁴⁰ Counsel made the above generalized statement on page 35 of his brief and he then cited three Florida cases as being supportive of his broad generalized statement. First of all, we submit that the Florida cases were reversed not on the aspects of the non triggerman theory as such but rather on procedural errors or on the fact that the trial judge imposed the death penalty over the jury determination that recommended a life sentence. In the case of *Cooper v. State of Florida*,

Thus without going to all the various jurisdictions; we submit that the death penalty has been imposed in Florida and Georgia as to aiders and abettors or co-conspirators.

We submit that the Ohio Statute covers the situation and the Court must give consideration to the "nature and circumstances" of the offense.

In conclusion as to this aspect of the petitioner's arguments we submit that:

336 Southern (2d) 1133 the Florida Supreme Court affirmed the death penalty against a person who jointly with another participated in a robbery in which a police officer was killed in the escape. There was no definite proof as to which defendant did the shooting. "No one saw the actual shooting except Cooper. . . . Cooper testified that Ellis followed the Deputy to the patrol car, fired two shots, returned to the Camaro and drove off. Cooper said he was in the passenger seat, where he was later found at all relevant times." The codefendant was subsequently killed in a shootout with police. The Florida Supreme Court held there was sufficient testimony to support the trial court's determination that Cooper fired the fatal shots.

In another Florida case almost exactly in point with the defendant's self serving confession in this case; the Florida Supreme Court upheld the death penalty as against a person who they determined was an aider and abettor. In the case of *Shokey v. State of Florida*, 338 So. (2d) 33 (1976) the Court sets up the facts on page 35 as follows:

" . . . he (the defendant) stated that he had attempted to take a short cut to beat the traffic and that, finding the road he took blocked, he stopped the car. The defendant said at that point that Kirsch put his arm around his grandfather's neck, started choking the victim and told the defendant to kill the motor. The defendant said he did as Kirsch told him and turned the motor and the lights off because he was afraid of Kirsch. Korsch then got the victim out of the car and stabbed him with a knife and beat him with a billy club."

The Florida Supreme Court upheld the death penalty as against the driver of the car.

In addition the Georgia Supreme Court on a number of occasions has upheld the death penalty as to an accomplice or aider and abettor. Three such cases are *State v. Smith*, 222 S.E. (2d) 308 (1976); *Coleman v. State*, 226 S.E. (2d) 911 (1976), and *Hill v. State*, 229 S.E. (2d) 737 (1976).

- (1) The petitioner, based on the evidence, would not even qualify for mitigation under the Model Penal Code.
- (2) The Ohio Supreme Court has directed that the Courts liberally construe the statutory phrase "nature and circumstances of the offense."
- (3) The defendant was convicted under an indictment charging him with being a principle offender and there was more than a sufficient amount of evidence to support this finding.
- (4) The imposition of the death penalty on an aider and abettor or accomplice who actively assists in the crime is not violative of the Constitution of the United States.

D. THE IMPOSITION OF THE DEATH PENALTY UPON AN OFFENDER WHO HAD A LONG RECORD OF OFFENSES WHICH IF COMMITTED BY AN ADULT WOULD BE FELONIES; AND, WHO WAS SIXTEEN AT THE TIME; AND, WHOSE THINKING AT THE TIME OF THE PRESENTENCE EXAM WAS CLEAR, COHERENT AND WELL ORGANIZED AND REFLECTED AN IQ BETWEEN 110 TO 120; AND, WHOSE ATTITUDE WAS "ITS A MATTER OF LIFE AND DEATH" WITH REGARD TO THE CAPITAL OFFENSE FOR WHICH HE WAS CHARGED; AND, WHO WAS EITHER THE TRIGGERMAN OR WHO ACTIVELY AIDED AND ABETTED THE TRIGGERMAN IN THE KIDNAPPING OF THE VICTIM AND KILLING THE VICTIM; AND, WHO HAD GONE OUT WITH HIS ACCOMPLICE AND HAD JUST KIDNAPPED A SECOND VICTIM IN THE SAME MANNER AS THE DECEDENT WITHIN LESS THAN 24 HOURS OF THE DECEDENTS DEATH DOES NOT OFFEND THE CONTEMPORARY STANDARDS OF DECENCY EMBODIED IN THE CONSTITUTIONAL PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

The petitioner in his brief and in his headnote for this section assumes many facts that are not factually correct and then goes into an argument with regard to accomplices. For the purpose of our presentation; we will divide this portion of the argument into two parts; the first being the history, character and nature of the petitioner and the

second the aider and abettor or accomplice's position insofar as death penalty statutes are concerned.

The lower Courts determined that this petitioner did not meet the standards to receive mitigation of his sentence.

We think that it might be appropriate to check out the evidence presented at the trial and the mitigation hearing to see if the petitioner would meet the guidelines set up by the Model Penal Code referred to by this Court in *Gregg v. Georgia*⁴¹ at page 194.

First of all the petitioner had a significant history of prior criminal activity which reflects 7 confrontations with the law and 6 determinations against him. Of the six determinations against him; one was a group of traffic offenses, and should be ignored. However, three of the offenses were crimes which if committed by an adult would be serious felony charges (housebreaking, robbery, auto theft) (Appendix 50).

The second test is clearly inappropriate because there was no evidence that the defendant at the time was under an extreme mental or emotional disturbance.

The third test is also clearly inapplicable because the victim was neither a participant nor consented to the homicidal act.

The fourth test is also clearly inapplicable unless you take the defendant's general attitude of "it's a matter of life and death" as being an excuse in extenuation of his conduct. Certainly neither this Court nor any Court has ever gone so far as to permit such an interpretation.

The fifth test is that the defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor. We feel that a detailed explanation of the facts as reflected in the

⁴¹ *Gregg v. Georgia*, 428 U.S. 153 (1976).

record will not even give the petitioner the benefit of this mitigating circumstance.

First of all there are only three people who know who pulled the trigger in killing the victim Mr. Graber; the defendant, his accomplice Samuel Hall and the decedent Mr. Graber. On one occasion the accomplice Samuel Hall accused the petitioner of being the triggerman. The petitioner gave a self serving declaration to the police in which he endeavored to reflect that he merely was tagging along after Samuel Hall. However, the independent facts do not necessarily reflect that the petitioner was as passive as he attempted to present himself to the police and the Court. The petitioner and his accomplice perpetrated the kidnapping. The petitioner on his own drove the car; which they had borrowed before the kidnapping back to its owner. The petitioner took over the driving of the stolen car with the victim in the trunk. The petitioner drove the car to the area where the brutal murder took place. In fact, the petitioner drove the car with the victim in the trunk, into the drive and turned the car around so that the trunk of the car was furthest from the road (R. 340). After the car was parked the petitioner in his self serving statement turned to his accomplice Hall; whose style he admired and asked Hall what they were going to do next. As reflected in the record of the trial no one could definitely say who was or was not the triggerman who actually shot and killed the victim, but it was clear that both of them actively participated in the brutal murder. As the facts reflected there were two shotgun blasts with a short interval between them in which according to Bell in his self serving declaration; Hall was going back to the car to get another shotgun shell. If we believe the defendant's self serving declaration as to who fired the shots we then must wonder what was the victim doing. Was he just waiting in the dense under-

brush for the triggerman to come back and successfully kill him or was he being held until the triggerman could get another bullet to finish off the job. As the Supreme Court of Ohio stated in their opinion (Appendix 139):

"The Court could reasonably disbelieve, AS WE DO, that Graber lay quietly with his hands behind his head while Hall left him alone to return to his car to reload his shotgun. Evidence of bruises on Graber's body, appellants statement to the police, the physical circumstances of the slaying, and the testimony of the eyewitness Pierce all would have justified the panels rejection of the appellants version and its conclusion that Bell either committed, or actively assisted in the murder."

(Capitalization ours for emphasis.)

When you then couple these facts with the second kidnapping in Dayton by the petitioner and his accomplice in which once again the victim was ordered into the trunk of his (the victim's) own car and was being kidnapped by the petitioner and his accomplice you have to come up with the conclusion that the defendant was either the triggerman or an active assistant in the perpetration of the brutal murder of the decedent.

Although there are only two people alive who actually know who pulled the trigger of the sawed off shotgun that caused the decedent's death; we respectfully submit that both the petitioner and his accomplice were active participants in the decedent's death.

The next generalized category is that the petitioner was under duress or under the domination of another person. The mitigation hearing reflected that the petitioner was not afraid of his co-defendant Hall (Appendix 43) and that he had taken up with the co-defendant Hall "because he admired his style" (Appendix 44).

The petitioner had ample opportunity on several occasions to abandon the co-defendant but at no time did he ever do so because he liked Hall's style.

II

ADDITIONAL FEATURES OF THE OHIO DEATH SENTENCING PROCEDURE MAKE IT ADEQUATE TO MEET ALL CONSTITUTIONAL CHALLENGES IN SO FAR AS CAPITAL PUNISHMENT IS CONCERNED UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

We respectfully submit that in so far as the second part of petitioners brief is concerned, the Ohio statutes have been adopted, and the procedures for review implemented, to assure the evenhanded administration of the death penalty and to insure that it will not be imposed in an arbitrary or capricious manner.

Many of the issues raised by petitioner in this portion of the brief are new and have never previously been raised. However, we believe that the Ohio capital punishment will be upheld on any of the challenges presented in this portion of the brief.

A. THE OHIO STATUTORY SCHEME FOR THE IMPOSITION OF THE DEATH PENALTY DOES NOT UNCONSTITUTIONALLY DENY THE ACCUSED THE RIGHT TO THE JUDGMENT OF HIS PEERS, REFLECTING COMMUNITY STANDARDS AS TO THE APPROPRIATENESS OF THE DEATH PENALTY IN HIS CASE.

First of all we submit that this issue has never been previously raised either at the trial level, the Court of Appeals of the First Appellate District; the Supreme Court of Ohio, or even in this Court on the Petition for Certiorari. It is to be noted that this Court accepted this case on the test as to whether the Ohio laws were violative of the Eighth and Fourteenth Amendments to the Constitution. As this Court stated in the case of *Irving v. California*,⁴²

"We disapprove the practice of smuggling additional questions into a case after we grant certiorari. The issues here are fixed by the petition"

We submit that the petitioner has never previously raised the test of the Constitutionality of the Ohio death penalty statute in so far as the Sixth Amendment to the United States Constitution is concerned.

We further submit that even if the petitioner had previously raised this issue; or, even if this Court had accepted this matter on Sixth Amendment grounds; the petitioners arguments are still without merit.

In Ohio, the crime of aggravated murder must be proven beyond a reasonable doubt. The aggravating specification

⁴² 347 U.S. 128, 74 S. Ct. (2d) 381 (1954).

(which brings on the death penalty) must also be proven beyond a reasonable doubt, whether the case is tried to the court or to the jury.⁴³

Thus it can be seen that under the Ohio system the determination of the defendant's guilt and whether he committed an aggravating specification is done by the judge or jury.

It is only after the defendant has been proven guilty of both the crime and the aggravating specification that the court takes over with regard to the sentence.

To the best of our knowledge there has never been a pronouncement by this Court or any other Court that requires the participation of a jury in the sentencing process after the defendant has been found guilty of the crime and the elements of the crime (specifications) which might increase the punishment.

Prior to *Furman v. Georgia*,⁴⁴ the Supreme Court of Ohio held that there was no constitutional provision prohibiting a three-judge court from determining the degree of guilt and sentence without the intervention of a jury, where a jury trial had been voluntarily waived, *State v. Ferguson*, 175 Ohio St. 390, 396 (1964), *State v. Frohner*, 150 Ohio St. 53 (1948). This Court held that Ohio's pre-*Furman* statutory scheme was constitutional in *McGautha v. California*.⁴⁵ It is submitted that the imposition of sentence by a three-judge panel or trial Court under the present statutory scheme is no different constitutionally

⁴³ Ohio Revised Code 2929.03 (B)

"... The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, . . ."

⁴⁴ *Furman v. Georgia*, 408 U.S. 238 (1971).

⁴⁵ *McGautha v. California*, 402 U.S. 183 (1971).

than allowing a three-judge panel to impose sentence without the intervention of a jury under the previous statutory scheme.

As this Court held in *Proffitt v. Florida*,⁴⁶ at page 252:

"The basic difference between the Florida system and the Georgia system is that in Florida the sentence is determined by the trial judge rather than by the jury. THIS COURT . . . HAS NEVER SUGGESTED THAT JURY SENTENCING IS CONSTITUTIONALLY REQUIRED. And it would appear that judicial sentencing should lead, if anything to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.

The Florida capital sentencing procedures thus seek to assure that the death penalty will not be imposed in an arbitrary and capricious manner."

It is also to be noted Mr. Justice Rehnquist in an opinion rendered on August 8, 1977 denied a rehearing on a Petition for Certiorari on this specific ground.⁴⁷

We therefore submit that the Ohio sentencing procedure by the judge in capital cases after the determination of

⁴⁶ *Proffitt v. Florida*, 428 U.S. 242 (1976).

⁴⁷ A-108 (76-6720) *Willie Lee Richmond v. State of Arizona*, 21 Cr L 4129

"Applicant raises a second argument in his petition for rehearing that was not raised either before the Arizona Supreme Court or in his earlier petition for certiorari. Applicant argues that the Arizona statute violates the Sixth, Eighth and Fourteenth Amendments in failing to provide for jury input into the determination of whether aggravating and mitigating circumstances do or do not exist. Such jury input would not appear to be required under this Court's decision in *Proffitt*."

guilt of the crime and guilt of the specification in aggravation of the crime beyond a reasonable doubt does not violate the Sixth, Eighth, or Fourteenth Amendments to the United States Constitution.

B. THE OHIO CAPITAL PUNISHMENT PROCEDURES NEITHER COERCE NOR ENCOURAGE A DEFENDANT INTO WAIVING HIS SIXTH AMENDMENT RIGHT TO A TRIAL BY JURY OR HIS FOURTEENTH AMENDMENT RIGHT TO PLEAD NOT GUILTY.

We respectfully submit that the Ohio capital sentencing procedure neither encourages nor discourages a defendant into waiving his right to a trial by jury or to plead not guilty to the crime.

The record reflects that the trial court painstakingly examined both the Petitioner and his counsel to ascertain whether his waiver of a jury trial was totally voluntary. Petitioner voluntarily, intelligently and knowingly waived a trial by jury and elected to be tried by a three-judge panel. At no time did Petitioner or his counsel assert that his Sixth Amendment right to trial by jury was being "chilled" by Ohio's statutory scheme which provides that a three-judge panel must unanimously find an absence of mitigating circumstances.

In fact, a check of the cases out of Hamilton County, Ohio reflects that defendants are choosing juries to determine their guilt or innocence as against choosing a three-judge panel almost four to one.⁴⁸

⁴⁸ Of the twenty-three cases that have emanated as aggravated murder with specification charges and gone to trial in Hamilton County, Ohio;

We submit that the facts clearly refute any allegations by the petitioner that the Ohio procedures in any way chills the petitioner's right to a jury trial or to plead guilty to the crime charged in the indictment.

Unlike the statute in *United States v. Jackson*, 390 U.S. 570 (1968), the death penalty is possible under the Ohio statute whether the defendant is tried before a jury or a three-judge panel, and it may be avoided under both alternatives.

Petitioner attempts to rest his argument of coercion on a "numbers" game. That is, it is easier to convince one of the three-judge panel that a mitigating circumstance has been proven than it is to convince only one judge. Obviously, this approach overlooks the possibility that the one judge the Petitioner may have to convince is the same judge who would have heard the case with a jury. For the sake of argument, it is submitted that it may be even easier for the Petitioner to convince one of the twelve jurors that he was not guilty or that he was not guilty of an aggravating circumstance. Without unanimity by the jury the result is either a hung jury or a life sentence.

As in any waiver of a constitutional right there are certain considerations which incline toward exercising the right and other considerations which incline toward waiving the right. The balance struck by these competing considerations is for the judgment of the defendant and competent trial counsel. That is what occurred in this case. Petitioner has detailed these considerations, which include the fact that there was no defense of alibi or self-defense, there was a confession which was not suppressed, and there were indications from pre-trial psychiatric reports

eighteen defendants have had their guilt or innocence determined by a jury and only five have waived a jury. Only one defendant plead guilty to the crime.

that an insanity defense would not prevail. It is submitted it was these considerations that were the basis for the jury waiver.

Mr. Justice Harlan observed in *McGautha v. California*,⁴⁹ that, "The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow. . . . Although a defendant may have a right even of constitutional dimensions, to follow whichever course he chooses the Constitution does not by that token always forbid requiring him to choose", 402 U.S. at 213. The fact that the Petitioner was faced with a difficult judgment as to which course to follow does not make Ohio's statutory scheme unconstitutional.

We respectfully submit that based upon the above statistics and based upon the above citations; the above procedure neither encourages jury waivers nor guilty pleas.

⁴⁹ *McGautha v. California*, 402 U.S. 183 (1971).

C. THE OHIO CAPITAL MITIGATION PROCEDURES WHICH ORDER THE COURT TO OBTAIN A PRESENTENCE REPORT AND A PSYCHIATRIC REPORT ON THE DEFENDANT AFTER HE HAS BEEN FOUND GUILTY OF THE CRIME AND THE AGGRAVATING SPECIFICATIONS PRIOR TO THE MITIGATION HEARING AND WHICH PLACES ON HIM THE BURDEN OF PERSUASION DOES NOT VIOLATE EITHER THE EIGHTH OR FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

We think that first and foremost it should be reflected that at the time of the mitigating hearing the defendant has been found guilty of all of the elements of the crime of aggravated murder and guilty of the aggravating specification beyond a reasonable doubt. All the elements of the capital offense have been proven beyond a reasonable doubt by the time of the mitigation hearing.

The defendant is not required to do anything at this point. The statute mandates that the trial judge order a presentence investigation and orders the Court to order a psychiatric examination of the defendant. Based on these post-trial reports the Court makes its determination as to whether mitigating factors exist. As can be seen, the defendant does not have to do anything. However, if he does nothing, he bears the risk of non persuasion. In Ohio the defendant is given the opportunity of presenting any relevant evidence including his own oral statements not subject to oath or cross-examination.

We submit that the Ohio procedure and the matter with regard to the burden is no different than the Florida statute

already approved by this Court. As this Court held in *Proffitt v. Florida* (ibid) at pages 248 and 249 with regard to the Florida mitigation hearing:

"Evidence may be presented on any matter the judge deems relevant to sentencing and must include matters relating to certain legislative specified aggravating and mitigating circumstances. Both the prosecution AND THE DEFENSE may present argument on whether the death penalty shall be imposed.

At the conclusion of the hearing the jury is directed to consider 'WHETHER SUFFICIENT MITIGATING CIRCUMSTANCES EXIST . . . WHICH OUTWEIGH THE AGGRAVATING CIRCUMSTANCES FOUND TO EXIST;' The jury's verdict is determined by a majority vote. It is only advisory."

(Capitalization ours for emphasis.)

The basic difference in proof as reflected by the Ohio and Florida statutes is that by the time of the mitigation hearing the aggravating specification has already been proven beyond a reasonable doubt. However, it is to be noted; Florida requires the jury to determine that sufficient mitigating circumstances exist which outweigh the aggravating circumstances. We can see little or no difference between saying it in this manner or saying it in the manner pronounced in the Ohio mitigation statute.

As the Ohio Supreme Court stated in the case of *State v. Robinson*, 47 O.S. (2d) 103 (1976) at page 107 and reaffirmed in *State v. Downs*, 51 O.S. (2d) 47 (1977) at page 55:

"The other sense of 'burden of proof' is the burden of persuasion. This refers to the risk which is borne by a party if the jury finds that the evidence is in equilibrium. The party with the burden will lose if

he fails to persuade the trier of fact that the alleged fact is true by such quantum of the evidence as the law demands."

How is this different from the Florida statute which requires the mitigating circumstances to outweigh the aggravating circumstances. If the defendant in Florida shows no mitigating circumstances and if the aggravating circumstances are shown he could lose by virtue of his non participation or non persuasion.

As the Ohio Supreme Court went on to state in the *Downs* case (ibid) at page 55:

"In a mitigation hearing the defendant does not bear the burden of initial production. Regardless of the defendant's participation or lack thereof in the mitigation hearing, the court has the initial responsibility to require that certain evidence be collected and certain examinations be made. From a careful consideration of those reports and of the evidence presented during the course of the trial, the judge, or panel of judges, decides whether mitigation is established by a preponderance of the evidence. If the defendant chooses not to present any evidence, the trial court may nonetheless find in his favor. If he chooses to present evidence, the court must consider any such testimony or documentary proof relevant to the sentencing decision. If the defendant makes a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation. R.C. 2929.03 (D).

As to the burden of persuasion, it is apparent from the statute that if the evidence is in equilibrium, the risk of non-persuasion falls upon the defendant."

All the elements of the crime including the aggravating specification have been proven beyond a reasonable doubt prior to the mitigation hearing. As this Court held in the

case of *Patterson v. New York*, 97 S. Ct. 2319 (1977) at page 2327:

"We thus decline to adopt as a constitutional imperative . . . that a state must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of the accused. . . . We therefore will not disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements including the definition of the offense which the defendant is charged. Proof of the nonexistence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here."

We cannot emphasize enough that by the time the mitigation hearing is had the defendant has been proven guilty beyond a reasonable doubt of the crime and the aggravating specification. The defendant does not have to do anything. The Court orders the presentence report and the psychiatric examination. The defendant has the burden of showing a mitigating factor. However, as the Supreme Court of Ohio reflected in *State v. Downs* (ibid) he doesn't have to do anything. The Court may have sufficient evidence before it to find a mitigating factor without the defendant doing anything.

We therefore submit that the Ohio procedures with regard to the mitigation hearing and the burdens on the defendant at the mitigation hearing do not violate either the Eighth or Fourteenth Amendments to the United States Constitution.

D. THE OHIO PROCEDURE FOR THE IMPLEMENTATION OF THE DEATH PENALTY PROVIDES FOR A MEANINGFUL REVIEW OF DEATH SENTENCES.

Before going into any argument with regard to the above subtopic we believe that a background of the Ohio law with regard to appeals might be appropriate. In Ohio there is a three tier structure with regard to the trial and appeal of criminal cases and more specifically capital cases.

First of all there is the Court of Common Pleas of the particular county where the crime has been committed. This is the trial Court.

We then have the State divided up into Appellate Districts. The First District Court of Appeals of Ohio from which this case emanated covers five counties.⁵⁰ Every defendant in every criminal case has a direct right of appeal by right to the Court of Appeals.⁵¹

If the Court of Appeals affirms the judgment of conviction and sentence; a defendant in a capital case has a right of direct appeal to the Supreme Court of Ohio.⁵²

We therefore submit that under Ohio law every defendant convicted of a capital offense has a right of direct appeal to the Supreme Court.

With the fact established that every defendant in a capital case has an absolute right of appeal to the Supreme Court as against an application for leave; we then turn to see what the Ohio Supreme Court has said about their review in capital cases.

⁵⁰ Hamilton, Butler, Clermont, Warren and Brown Counties.

⁵¹ Ohio Rules of Appellate Procedure, Rule 4 (B).

⁵² Article IV, Section 2 (B) (2) (a) (ii).

The first Ohio Supreme Court case on the death penalty since the *Furman* case was the case of the *State of Ohio v. Bayless*, 48 O.S. (2d) 73 (1976). The Supreme Court in that case at page 86 stated:

"... this Court has a particular opportunity and responsibility to assure that death sentences, which may be brought to this Court for review as a matter of right, are not imposed arbitrarily and capriciously. We have in this case, and will in all capital cases, independently review the aggravating and mitigating circumstances presented by the facts of each case to assure ourselves that the capital sentences are fairly imposed by Ohio's trial judges."

The Ohio Supreme Court further stated in the *Bayless* case (ibid) at page 85:

"The explicit nature of the specifications allows effective judicial review of whether the jury's verdict was supported by the evidence."

The Court went on to say in the *Bayless* case (ibid) at page 86:

"It is an essential judicial task to assure that those standards (referring to the standards set up by the legislature for mitigation) be strictly construed in favor of the defendant, to allow the broadest consideration of the mitigating circumstances consistent with their language."

The Ohio Supreme Court stated in the case of *State of Ohio v. Osborne*, 49 O.S. (2d) 135 (1976) at page 146:

"The Ohio statutes require the death sentence to be imposed upon all defendants convicted of aggravated murder coupled with at least one of the aggravating circumstances provided none of the three mitigating factors exist. All similarly situated defendants are those sentenced alike."

As can be seen from the above quotations the Ohio Legislature has set forth certain specific types of murder which can bring on the death penalty. They have set forth certain aggravating specifications which must be proved beyond a reasonable doubt. They have set forth certain mitigating factors. Thus the legislature has set forth the crime and set forth the areas of mitigation to assure the evenhanded administration of justice and to channel and guide the discretion to assure that the death penalty will not be imposed in an arbitrary or capricious manner. It is the responsibility of the trial court, Courts of Appeal and the Supreme Court to assure the evenhanded administration of capital sentences. We respectfully submit that the Ohio Courts are carrying out their responsibilities under the guidelines for the evenhanded administration of capital sentences and mitigation proceedings.

The trial courts are following the guidelines set up by the legislature to channel the discretion of the mitigation proceeding. As was indicated in the *State of Ohio v. William Mascus* (ibid) proceeding the trial courts are giving consideration to the nature and circumstances of the crime and the defendant's participation in the crime in granting mitigation.

The Appellate Courts in Ohio are also following these guidelines in reviewing capital punishments. The two cases of *State of Ohio v. Hines* (ibid) and *State of Ohio v. Lucas* (ibid) have already reflected how the upper appellate courts in Ohio; when appropriate on the record before them, will follow the legislative guidelines and set aside that portion of the sentence involving the death of the defendants. As will be recalled; that was the Court of Appeals decision in which the death sentences were set aside because the record reflected the mitigating factor that the victim induced the crime.

In another unreported case the Court of Appeals of the First Appellate District set aside a death sentence on the basis of lack of sufficient evidence to support the aggravating circumstance and aggravating factor.⁵³

In another capital case the Court of Appeals of the First Appellate District of Ohio set aside eleven consecutive life terms to a capital charged defendant insofar as improper statements by the Court which might have induced him to waive his right to a jury trial.⁵⁴

In still another case emanating out of the Court of Appeals of the First Appellate District of Ohio that Court criticized the trial court in not following the guidelines set up by the legislature with regard to capital cases.⁵⁵

Amongst the rather lengthy decision by the Court of Appeals in that case; they made the following statements:

"We view the extraordinary procedure adopted by the Court in its disposition of the charges and specification presented against Palmore as raising the issue of discriminatory application of the death penalty."

and

"This Court has decided in a line of cases . . . that (a) the Ohio statutes imposing the death penalty do not permit arbitrary, discriminatory, and freakish application thereof and thus meet constitutional muster under *Furman v. Georgia*, 408 U.S. 238 (1972); and (b) that those same statutes do not impose cruel and unusual punishment contrary to the Federal and State Constitutions."

⁵³ *State of Ohio v. Deitsch*, C 75385 (rendered November 29, 1976).

⁵⁴ *State of Ohio v. James Ruppert*, C A 75-08-0067 (rendered August 3, 1977).

⁵⁵ *State of Ohio v. Curtis Palmore*, C 75231 (rendered December 13, 1976).

and

"There appears the distinct possibility that if the foregoing Rule 11 (C) (3) is construed to bear the weight the trial court placed on it, the distinct spector of arbitrary and even freakish application of capitol punishment then arises to haunt the Ohio procedure."

and

"Without laboring the matter further, we conclude that Criminal Rule 11 (C) (3) must be construed to preclude the kind of action taken by the trial court in the *Palmore* case, and its use limited to those instances, as above, WHERE THE ACTION IN DISMISSING THE SPECIFICATION IS SUBJECT TO ASCERTAINABLE, PREDICTABLE AND DEFINABLE PARAMETERS."

(Capitalization ours for emphasis.)

The Court then went on to set aside a proceeding in which the trial court plea bargained directly with a defendant over the strenuous objections of the State and amongst the reasons given for dismissing the specification was that it would avoid a lengthy trial.

We fully appreciated that the quotations from this case of the Ohio trial Courts or Courts of Appeal are not necessarily binding on this Court. However, we do believe that they clearly reflect that all of the Ohio Courts carefully consider the death penalty within the guidelines of the legislature and the pronouncements of the Supreme Court. They further reflect that the Ohio Courts carefully examine each case in review to make sure that said case falls within the parameter of the guidelines set up by the legislature.

To the best of our knowledge this Court has never set up any specific type of appellate review as passing constitu-

tional muster. The basic difference between Ohio and the Florida laws in regards to appellate review is that the Ohio cases go through one intervening tier of Courts.

The Ohio Appellate Courts scrupulously adhere to the requirements as reflected in the *Bayless* case (ibid) that each case will be independently reviewed as to both aggravating and mitigating circumstances so as to assure that the capital sentences will be fairly imposed.

As can be seen, the Ohio Courts where appropriate, do not hesitate to set aside the death penalty.

Counsel for the petitioner has reflected that the Ohio Supreme Court has only once set aside the death penalty in the twenty-six cases that they have reviewed to date. We submit that this is not inconsistent with the Florida cases and the decisions by the Supreme Court. In preparation for this brief we have endeavored to read every capital decision rendered by the Florida Supreme Court since *Furman*. A reading of those reported cases will reflect that the Florida Supreme Court has never once set aside the death penalty absent a prior jury recommendation of a life sentence. The Florida Supreme Court in the case of *Tedder v. State of Florida*, 322 So. (2d) 908 at page 910 stated:

"A jury recommendation under our trifurcated death penalty statute should be given great weight, in order to sustain a sentence of death following a jury recommendation of life, the facts suggesting the sentence of death should be so clear and convincing that virtually no reasonable person could differ."

Thus, although the Florida jury is considered to be only advisory; its majority vote by a trial judge can only be set aside where "the facts suggesting death (are) . . . so clear and convincing that virtually no reasonable person could

differ". We submit these are rather strong words to be placed upon an advisory recommendation.

As indicated; to the best of our knowledge by way of the reported cases to date; never has the Florida Supreme Court ever set aside a death penalty where they have not been confronted with the rule set down by *Tedder* (ibid) or a procedural error.

We submit that the Ohio system of appeal by right to the Court of Appeals and the Supreme Court provides the necessary and appropriate safeguards in the review necessary to assure that the death penalty will not be imposed in an arbitrary or capricious manner.

CONCLUSION

We feel that this Court's pronouncement in *Gregg v. Georgia* (ibid) under Section V at page 206 of that opinion is equally applicable to the Ohio statute.

The new Ohio statutes limit the type of murder for which a defendant may receive the death penalty. They also require the prosecution to prove one of the aggravating specifications beyond a reasonable doubt. Only after the crime and the specification have been established does the mitigation portion begin. The Legislature has required that the trial court obtain a presentence report and a psychiatric report on the defendant. The Legislature has set forth certain mitigating factors in order to channel and guide the trial courts discretion. The nature and circumstances of the offense as well as the character and background of the defendant are given substantial weight with regard to the mitigating specifications.

Both the Courts of Appeal in Ohio and the Supreme Court of Ohio carefully review every case to assure the even handed administration of the death penalty and to assure that it will not be imposed in an arbitrary or freakish manner. The penalty hearing is individualized to the particular defendant within the guidelines of mitigation set up by the Legislature. As this Court held in *Gregg* (ibid) at page 201 and 207:

"No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines."

We submit that with the exception of the word jury; the same clause is equally applicable to the Ohio statutes and the procedures thereunder.

We submit that the death sentence imposed on the petitioner in the current case is not in violation of any of his constitutional rights as set forth by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-6513

WILLIE LEE BELL,

Petitioner,

v.

THE STATE OF OHIO,

Respondent.

REPLY BRIEF OF PETITIONER

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WILLIE LEE BELL,

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v.

THE STATE OF OHIO,

Respondent.

REPLY BRIEF OF PETITIONER

**THE RAISING OF CONSTITUTIONAL ISSUES
IN THE STATE COURTS**

In its brief, at p. 19, Respondent suggests that some of the attacks made by Petitioner on Ohio's death penalty statutes were never raised in the Ohio Courts.

In the trial court, Petitioner argued (1) the narrowness of the statutory mitigating circumstances [A.107-8]; (2) the absence of meaningful consideration of Petitioner's youth [A.108]; (3) the absence of meaningful consideration of Petitioner's minor role in the killing [A.108]; (4) the absence of consideration of the offender's prior record as a meaningful criterion [A.108]; (5) the absence of consideration of whatever other mitigating factors the offender sought to offer [A.107-8]; and (6) the Sixth Amendment

challenge that coercion of jury waivers is implicit under the Ohio capital statutes [A.109].

In our brief in the Ohio Court of Appeals, at p. 8, we attacked the Ohio capital statutes because "the youth of the appellant, the fact that the appellant told the truth, the most significant fact that the State could not prove that the appellant participated in the actual killing under any interpretation of the facts, the fact that appellant cooperated with the police, could not be considered as circumstances which could be considered in extending mercy." At p. 27 of that brief, we also attacked the coercion by the statutes which forced Petitioner to waive his right to trial by jury.

In the Ohio Supreme Court, our brief again attacked the Ohio capital statutes because the above-mentioned factors were not permitted to be considered under Ohio statutes. See Petitioner's brief in the Ohio Supreme Court at p. 17. The jury waiver question was raised therein at p. 37 and absence of homicidal participation at p. 51. The *Gregg* issues were not specifically included in the brief as such when the brief was filed in the Ohio Supreme Court on June 7, 1976, but were argued in that Court on October 14, 1976, and were included in the Petition for Rehearing therein [A.30-35].

At pp. 24, 65 and 66 of its brief, Respondent accuses Petitioner of attempting to "sneak into this matter a completely new issue"—the Sixth Amendment issue. On p. 66, we are alleged to have omitted the absence of jury participation as an issue from our Petition. There are two Sixth Amendment issues before the Court: the absence of jury participation in the sentencing process and the needless encouragement of jury waivers. Both appear in our Petition, the former as Question I-F at pp. 32-35, and the latter as Question I-C at p. 17, and both were included within Question I, as to all of which certiorari was granted by this Court.

Petitioner was tried 18 months before the *Gregg* decisions, and his brief was filed in the Ohio Supreme Court three weeks before those decisions. Nevertheless, his principal constitutional arguments here were all raised and decided below. A few

subsidiary contentions were not, but these are procedural questions of law inherent in the Ohio statutory scheme, lack of jury participation and misallocation of the burden of proof, which have been found constitutional by the Ohio Supreme Court in recent cases, *State v. Weind*, 50 Ohio St.2d 224 as to the former, and *State v. Downs*, 51 Ohio St.2d 47 as to the latter. The question of the adequacy of state-wide appellate review could not have been raised before the *Gregg* cases, which first raised the constitutional significance of that issue, and it also would have been presumptuous to argue the absence of such consideration at a time when the Ohio Supreme Court had not yet announced a decision in a post-*Furman* capital case, the first of which was announced six weeks after our oral argument before that Court. Under such circumstance there is no impediment to consideration by this Court of each issue raised in our brief, *O'Connor v. Ohio*, 385 U.S. 92 (1966), *Leary v. United States*, 395 U.S. 6 (1969).

I.

A. The Ohio Capital Punishment Statutes Are So Narrow And Rigid That They Affront The Constitutional Principles Forbidding Mandatory Death Sentences.

We have argued that the Ohio statutory mitigating factors are so narrowly drawn and more narrowly interpreted by the Ohio Supreme Court that the Ohio scheme is virtually mandatory and precludes meaningful consideration of factors indispensable in any constitutional capital sentencing process. In support of our contentions, we examined not only the language of a great number of post-*Furman* capital decisions of the Ohio Supreme Court, but the results of those cases as well.

Respondent, however, has totally ignored the practical meaning and effect of the Ohio statutes and has also ignored the particularly brutal and eviscerating interpretation of those statutes by the Ohio Supreme Court, choosing instead to rely upon selected language from the statutes and the decisions of the Ohio court, with the apparent intention of emphasizing the words of that Court while ignoring what that Court has actually done. Frequently, finding no solace in the language of the Ohio Supreme Court, Respondent is forced to rely upon many unreported lower state court decisions. Its abortive effort to obtain undeserved mileage from such decisions illustrates the weakness of Respondent's position.

We have demonstrated that the first statutory mitigating factor, victim-inducement or facilitation, is virtually illusory, and noted that the Ohio Supreme Court has yet to interpret this factor.¹ Respondent alleges, however, that this factor is really quite broad, and illustrates its contention with an unreported appellate decision, which actually establishes our contention, *State v. Hines & Lucas*, # 634,639 (Fifth.Dist. Court of Appeals, 2-25-77). At the outset, we note that an Ohio statute, § 2503.20 R.C., provides that opinions be reported for publication "before they shall be recognized by and receive the official sanction of any court." Thus, unreported decisions of an Ohio court are not binding on any Ohio court, and certainly, contrary to Respondent's assertion, cannot constitute the law of Ohio, see *National Surety v. Blackburn*, 62 O.L.A., 106 N.E.2d 780, 781 (Ohio App. 1951).

Nonetheless, Respondent's reliance upon *Hines & Lucas* is misplaced, for several reasons: to the extent that the case is binding, it is so in only one of Ohio's eleven appellate districts; second, and more importantly, that decision applies the victim-inducement factor even more narrowly than required by the

¹Although this factor still has not been interpreted by the Ohio Supreme Court, it was referred to in the recent case of *State v. Cooper*, 52 Ohio St.2d 163 (1977).

statute, as the *Hines* court held that before an offender may avail himself of victim-inducement mitigation, it must first appear that the acts of the victim constituting inducement be unlawful. The addition by judicial fiat of an additional prerequisite to the application of victim inducement mitigation makes it even less likely that it will apply in any given situation. Ohio's victim-inducement mitigation under the reading urged by Respondent is thus more narrow and illusory than in the statute itself.

Respondent's brief wholly ignores our argument that the second statutory mitigating factor is illusory. Instead, relying solely on carefully selected language from *State v. Woods*, 48 Ohio St.2d 127, 357 N.E.2d 1059 (1976), and disregarding the outcome of the case, Respondent expansively declares, at p. 40, that in *Woods* "the Ohio Supreme Court has substantially broadened the definition of coercion and duress." Nowhere is the absurdity of that statement, and the vast discrepancy between the words and the actual results of the Ohio Supreme Court's capital decisions more apparent than in *Woods*. The reader is impelled to conclude that Woods' life will be spared, only to be confronted with the awful reality that Woods is condemned to die in an opinion which convincingly demonstrates that he deserves to live.

In reply to our challenge to the Ohio statutes regarding the third and final mitigating circumstance, that the offender suffered from a mental deficiency or psychosis, primarily causing the killing, Respondent relies almost exclusively on the expansive language in *State v. Black*, 48 Ohio St.2d 262, 358 N.E.2d 551 (1976), ignoring the additional language in that case that to define such terms as "mental deficiency" is to narrow them. Most critically, Respondent ignores the fact that in several post-*Black* cases, the Ohio Supreme Court ignored its language in that case and condemned a moron with an I.Q. of 58 (*State v. Royster*, 48 Ohio St. 381, 358 N.E.2d 616) who would seem to qualify for a life sentence even under the *Bayless* definition; see also *State v. Harris*, 48 Ohio St.2d 351, 359 N.E.2d 67, *State v. Edwards*, 49

Ohio St.2d 31, 358 N.E.2d 1051, *State v. Weind*, 50 Ohio St.2d 224, 364 N.E.2d 224, and the instant case. In fact, *the Ohio Supreme Court has upheld the death sentence in every case it has reviewed to date where the offender suffered from a mental abnormality*. Taken with the fact that this third mitigating statutory factor is the only factor concerned with the characteristics of the offender, rather than with the circumstances with the offense, the interpretation of such factor by the Ohio Supreme Court, and Respondent's refusal to acknowledge the effect of the decisions, exemplifies that the third mitigating factor is virtually illusory.

Of course, Petitioner's case best exemplifies the narrowness of the mitigating factor, and reveals that, despite *Black*, the Ohio Supreme Court intends to adhere to its narrow definition first given in *Bayless*: Petitioner has established that at the time of the offense, he was 16 years of age; had taken drugs on a daily basis continuously for three years preceding arrest, and on the night of the murder as well; that he had an I.Q. of 81 two years before the offense, and it was estimated at 90 by psychiatrists a few weeks later; that he was placed in a special school for emotionally disturbed youth; that his teachers described him as emotionally immature and constantly on drugs; that he was suffering, according court psychiatrists, from a moderately diminished capacity to comprehend the seriousness of his situation, even after he had been indicted as an adult and was aware that he could die in the electric chair.² If, as Respondent contends, the Ohio Supreme Court's definition of mental deficiency is generously

²This is to say nothing of his capacity to comprehend the seriousness of his situation on the night of the murder. Further, Respondent quotes Petitioner's statement to the psychiatrists that his fate was "only a matter of life and death," apparently to convey the impression that Petitioner is an unfeeling brute. To the contrary, such a remark demonstrates Petitioner's inability to appreciate his peril and underscores his mental aberration.

broad, it is inconceivable that Petitioner Bell is now on death row. His case is itself compelling evidence that the occasional expansive language carefully culled by Respondent from the statute and a few Ohio capital cases is not the law of Ohio, but that the Ohio mitigating mental condition, far from being broad and generous, is narrow to the point of nonexistence.

B. The Ohio Capital Sentencing Statutes Preclude The Meaningful Consideration Of The Character And Record Of The Offender As Part Of The Capital Sentencing Process.

On page 44 of its brief, Respondent attempts to convince the Court that adequate consideration of the character and record of the offender is given under the Ohio statutes, and cites, with great emphasis, *part* of § 2929.04(B) R.C. in support of that contention. Most significant, however, is the portion of the statute *omitted* by Respondent—the part that limits the consideration of the "history, character and condition" of the offender to the narrow inquiry of whether one of the three exclusive mitigating factors exists.³

Respondent further quotes from the opinion of the Ohio Supreme Court below that the statute is strictly construed in favor of the accused [A.141-2]. However, the language of the

³The restrictive nature of the statutory provision concerning the "history, character and condition of the offender" is immediately apparent when that phrase is read with the rest of the statute: ". . . the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character and condition of the offender, one or more of the following is established by a preponderance of the evidence: [the statute then cites the three mitigating circumstances - victim inducement, duress, coercion and provocation, and psychosis and mental deficiency as a primary cause of the offense, through not amounting to insanity.].

Court is misconstrued by Respondent into an allegation unsupported by any case law that the Ohio statute thus construed permits consideration of particularized mitigating factors concerned with the character and record of the offender independent of the existence of the three mitigating factors provided in the statute. It does not so permit. Even under the most expansive reading of the Ohio cases, it is clear that particularized attributes of the offender are not accorded independent significance, but may be considered only with respect and to the extent that they are relevant to the existence of the three narrow statutory mitigating factors. In our brief, we demonstrated that mitigating factors generally felt to be significant, and in some instances constitutionally required, have little or no relevance to the existence of the mitigating factors cognizable under the Ohio statutes.⁴

Further, there are certain other factors, also recognized by this Court, which have no relevance to the existence or absence of the

⁴We take issue with what has been argued by Respondent and stated below by the Ohio Supreme Court—that “age” is relevant to the existence of a mental deficiency. While generally such a relationship between age and mental condition might seem arguable, youth is not relevant under the peculiar definition of the statutory term “mental deficiency” in the post-*Furman* capital cases of the Ohio Supreme Court. It will be recalled that the Court equates mental deficiency with mental retardation, *State v. Bayless, supra.*, and that such is the state of being a moron, imbecile or idiot. It will further be recalled that the determination of mental retardation is made by measuring mental age against chronological age, resulting in a quotient known as the Intelligence Quotient, or I.Q. The crucial fact here, ignored by Respondent, is that I.Q. does not depend upon youth. One may have an I.Q. of 200 at age 15 or at age 50; similarly, one may have an I.Q. of 60 at age 15 or at age 50. Consequently, the youth of the offender, considered by this Court as an important mitigating factor in *Gregg*, cannot materially assist an Ohio sentencer in determining the existence of “mental deficiency” under the Ohio law as interpreted by the Ohio Supreme Court.

Ohio mitigating factors and which are thus accorded no significance in the Ohio sentencing procedures.⁵

An indication of the correctness of our position in this respect is the fact that Respondent cites only two lower court decisions, both unreported,⁶ in support of its conclusion that Ohio's

⁵The extent of an offender's cooperation with police is an important mitigating factor, also recognized by this Court in *Gregg*. Yet, cooperation has nothing to do with a determination of whether the victim induced his death, with whether the offender acted under duress, coercion or provocation, or with whether the offender is psychotic or mentally deficient primarily causing the offense. Cooperation is thus accorded no significance under Ohio's statutes, a fact which is underscored in this case by the fact that Petitioner was completely cooperative with police and gave them the only first hand account of the grisly events culminating in the death of Mr. Graber, and which account undoubtedly assisted in the successful prosecution of the codefendant; yet Petitioner was condemned to death by each of the thirteen Ohio judges who passed upon his sentence without any consideration of his cooperation with law enforcement officials.

In *Gregg*, this Court also stated that whether an offender has a record of prior capital offenses should have some bearing upon his sentence. The absence of such a record did not assist the Ohio courts in determining whether the victim induced his death, whether Petitioner was under the influence of duress, coercion or provocation, and whether Petitioner is mentally deficient or psychotic. It should come as no surprise, then, that the absence of a prior capital record did not affect Petitioner's death sentence.

The same analysis can be made for other particularized facets of the offender's personality found to have significance by this Court, but which are accorded no significance under the Ohio scheme: moral justification, *Harry Roberts v. Louisiana*, 97 S.Ct. 1993, emotional disturbance, the influence of drugs or other intoxicants, etc. This case is the perfect example how even the presence of almost *all* of the factors deemed important in *Gregg* and *Harry Roberts* are accorded no significance, and hence have no effect under the Ohio laws. Consequently, in this case, a youth has been condemned to death though he manifests several constitutionally mitigating characteristics.

⁶See our discussion, ante at p. 3-5, regarding the Ohio statute providing that unreported decisions are entitled to no consideration.

statutes are sufficiently broad to permit independent consideration of these factors. We have previously discussed *State v. Hines & Lucas, supra*, and need not redemonstrate its inutility.

The other case, *State v. Mascus*, cited at p. 45 of Respondent's brief, is an unreported case in the Court of Common Pleas of Hamilton County. Apart from the fact that an unreported trial-level decision cannot constitute the law of Ohio, *Mascus* is of no assistance to Respondent, as the language quoted is ambiguous, and the trial court concluded there that one of the statutory mitigating circumstances had been established.⁷

⁷We anticipate that Respondent will seek to rely upon a very recent unreported decision of a visiting judge in the Court of Common Pleas of Hamilton County, at the penalty trial in a capital case in which counsel for Petitioner represented the offender, *State v. Ervin*, [Case No. B 772003, 12-21-77]. In that case, the trial judge found the presence of the mitigating circumstances of duress and coercion, but also stated that in his interpretation of § 2929.04 (B) the word "regardless" permitted him to consider mitigating factors other than those enumerated in the statute, and referred to the defendant's youth, cooperation and the fact that the codefendant, said to be the actual killer, was acquitted.

Any reliance which might be placed by Respondent on *Ervin* in this case will be misplaced for no less than five reasons:

(1) *The decision re discretion was dicta.* Since the trial court found a statutory mitigating factor to exist, his interpretation that he could go beyond the statute was dicta.

(2) *The decision was based upon an erroneous reading of the statute.* The judge's decision could only be justified if the word "regardless" referred to the existence of the mitigating circumstances later appearing in the statute. Yet the statute clearly states that "Regardless of whether one or more of the *aggravating* circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, . . ."

(3) *The decision was contrary to Ohio law.* Petitioner had, to a more certain degree than did Ervin, the same, save for one, mitigating factors: youth (Petitioner was 16, Ervin 19), cooperation (Petitioner gave a full statement voluntarily, was described as cooperative by police, and reiterated the truth of the statement at the penalty trial; Ervin denied at trial ever having made the statement) and he was dominated by a

(continued)

There is, however, a recent reported decision which is of more than passing interest in considering whether Ohio's capital statutes adequately provide for the meaningful consideration of the character and record of a capital offender as part of the sentencing process. See *Commonwealth v. Moody*, __ A.2d __ (11-30-77). In *Moody*, the Pennsylvania Supreme Court rejected as unconstitutional a statute⁸ remarkably similar to, and indeed somewhat broader than, the Ohio statutes here under attack, for the precise reason that the only offender-related statutory mitigating factor, "even if . . . liberally interpreted, . . . does not permit the sentencing authority in making its ultimate

(footnote continued from preceding page)

codefendant (the *Ervin* judge cited the fact that the codefendant was a big man and Ervin was known as "Shorty." Yet Petitioner was also considerably smaller than his codefendant, who, in addition, was armed with a sawed-off shotgun.). Thus, if the decision of the Ohio Supreme Court in our case below represents the law of Ohio, as it must, then the *Ervin* decision was contrary to law.

(4) *The Ervin decision, to the extent that it represents the law of Ohio, incurably infects Ohio capital procedure with the arbitrary and capricious discretion to impose the death penalty condemned in Furman v. Georgia.* Since Petitioner raised below the same mitigating factors which were considered in the "new-found" discretion in *Ervin*, the disparity between Petitioner's and Ervin's sentences indicates that, if *Ervin* is correct, whether one man lives and another dies depends, not upon guided discretion, but upon judicial whimsy of the sort ruled unconstitutional in *Furman*. Further, Petitioner Bell, Lockett and the 81 others presently on Ohio's death row were condemned without the sort of consideration extended by the *Ervin* judge. If that judge is correct, the violation of *Furman* implicit in that case renders all death sentences in Ohio before the date of that decision constitutionally infirm under *Furman*, to say nothing of the raising of an additional equal protection issue.

(5) *The decision is an unreported trial-level case, and thus cannot constitute the law of Ohio.* See our discussion *ante*, at pp. 3-5 re the inutility of unreported cases under the Ohio statute.

⁸18 Pa.C.S.A. § 1311 (1977-78 Supp.).

decision to focus sufficiently upon the *entire* character and record of the offender," and therefore affronts the constitutional requirement that "the sentencing authority [must] be allowed to consider whatever mitigating evidence relevant to his character and record the defendant can present." [Emphasis added]

The Pennsylvania court stated its concerns with the restrictiveness of the consideration which could be accorded under the statutes to the character and record of the defendant:

Of the three [mitigating circumstances] listed,⁹ only subsection (d)(2)(i) [age, lack of maturity or youth of the defendant at the time of the crime] can be said to focus the jury's attention upon the character and record of the defendant as ~~opposed~~ to the circumstances of the crime, and that only to the limited extent of determining his age, lack of maturity or youth *at the time of the killing*. [Emphasis is the Court's] . . . *the absence of a prior criminal record or even positive achievements or good works cannot be considered as mitigating*. [Emphasis ours.]

Significantly, the Pennsylvania Supreme Court rejected the contention of the prosecution, echoed in the present case, that the statutes ostensibly do permit consideration of evidence of the defendant's character and record. That court recognized, precisely as we have urged herein, that where this kind of evidence is considered relevant only to the establishment of three exclusive narrow statutory circumstances, such consideration does not satisfy the command of the Constitution that all facets of the character and record of the offender must be meaningfully

⁹The Pennsylvania statute, like Ohio's provided a list of aggravating circumstances and required a bifurcated trial. The mitigating circumstances are (1) age, lack of maturity, or youth of the defendant at the time of the killing, (2) victim inducement and (3) duress. It is immediately apparent that Ohio and Pennsylvania share two of three mitigating circumstances, and that the Pennsylvania "age, lack of maturity or youth" is broader than Ohio's "psychosis or mental deficiency" primarily causing the death of the victim.

considered in capital sentencing, *Harry Roberts v. Louisiana*, 97 S.Ct. 1993 (1977).

The Pennsylvania Court, ruling its state's statute unconstitutional, found:

. . . the constitutional defect of section 1311 is that, unlike the statutes approved by the Supreme Court, it so narrowly limits the circumstances which the jury may consider mitigating that it precludes the jury from a constitutionally adequate consideration of the character and record of the defendant.

Moody is impressive authority for the position taken in our brief that Ohio's almost identical and even more restrictive capital statutes are unconstitutional.

I-D

In Petitioner's brief, we noted that only six of the 362 persons executed since 1955 were nontriggermen.¹⁰ Subsequent research based upon the same sources indicates that, in the same period, but three of the 362 persons executed were under the age of 18.¹¹ America is thus as reluctant to execute its children as it is to

¹⁰Since the filing of our brief, we have discovered additional executions, all of triggermen, whose cases were reported in the National Reporter System: SOUTH CAROLINA: *State v. Waitus*, 77 SE2d 256 (1953), 83 SE2d 629 (1974), *State v. Wright*, 90 SE2d 492 (1955), *State v. Byrd*, 93 SE2d 900 (1956); TENNESSEE: *Voss v. State* 278 SW2d 667 (1955); VIRGINIA: *Lucas v. Commonwealth*, 112 SE2d 915 (1960); OKLAHOMA: *Young v. State*, 357 P.2d 562 (1961); UTAH: *State v. Rodgers*, 8 Utah 2d 156, 329 P.2d 1075 (1958); FLORIDA: *McVeigh v. State*, 73 So2d 694.

We have also discovered an erroneous citation in Appendix A in our brief: Case No. 217 is corrected cited as *Wiggins v. State*, 80 So.2d 17 (1955).

¹¹The three, all age 17, one year older than Petitioner on the date of the offense herein, are J. Johnson (1961, Alabama); Leonard Shockey (1959, Maryland); and Norman Royce (1956, New York). All were black.

execute those not clearly shown to have personally perpetrated the homicide for which they were convicted.

In an attempt to convince the court that non-triggermen are frequently condemned, Respondent cites several cases. Before considering those, we emphasize that we have not contended that non-triggermen are not sentenced to death with some frequency, but merely that when it comes time to execute the sentence of death, non-triggermen are executed in the rarest of cases.

An analysis of the five cases thus cited by Respondent is revealing: in each case the record reveals that the defendant actually killed someone (and was thus not the non-triggermen Respondent claims), or knew in advance of the killer's intent, or participated in a multiple murder. None of these factors is shown in the present case.¹² Thus the cases cited by Respondent do not support the acceptability or the constitutionality of the concept of death by association, where one who did not kill anyone, who did not possess any homicidal intent or who did not even know that someone would be killed, may be condemned for the fatal act of his codefendant.

In Part I-D of its brief, as well as in other sections, Respondent makes several allegations concerning the facts below which merit brief comment. Throughout its brief, Respondent imputes acts of codefendant Hall to Petitioner by the use of the word "they" to

¹²In *Shockly v. State*, 338 So.2d 33 (Fla. 1976), the defendant admitted participation in a homicidal scheme, knowing for days that the death of the victim was intended by the killer. In *Cooper v. State*, 336 So.2d 1133 (Fla. 1976), the Florida Supreme Court found that the defendant was, in fact, the triggerman. In *Coleman v. State*, 226 S.E.2d 911 (Ga., 1976), the Georgia Supreme Court found that "the defendant killed Chester Alday with a single shot in the head." Coleman is hardly a non-triggerman. In *Hill v. State*, 229 S.E.2d 737 (Ga. 1976), the defendant's sentence was commuted to life imprisonment on September 28, 1977 - see the records of the Georgia Pardon & Parole Commission, and in *Smith v. State*, 222 S.E.2d 308 (Ga. 1976), the defendant had advance knowledge and complicity in a multiple murder. Clearly, all of these cases cited by Respondent are distinguishable from our situation.

describe what the record reveals are acts solely perpetrated by Hall. Further, Respondent states that Petitioner held a shotgun on witness Hardin the day after the murder [R. Brief, p. 15]. However, the record reveals that the witness saw no such thing, and, more importantly, Petitioner's objection was at first sustained to this evidence, which was then accepted on the basis of the representation of the prosecutor that it would be tied in by Petitioner's statement. That statement, however, made no reference to this disputed testimony, and it must be assumed that the trial court did not consider it. Thus, Respondent's allegation that Petitioner handled a gun is totally unsupported. [R. 281-4] Finally, in a case cited by Respondent is another context, *Cooper v. State*, *supra*, the Florida Supreme Court ruled that evidence based upon a witness' sense of hearing of car doors allegedly closing was speculative and properly excluded. Such a ruling applied here would make Pierce's testimony worthless. Thus, the only evidence other than Petitioner's statement is circumstantial, and is totally consistent with Petitioner's contention that he did not participate in the killing; it thus cannot be cited to prove the opposite, *State v. Kulig*, 37 Ohio St.2d 157 (1974).

II.

D. The Adequacy Of Ohio Appellate Review Of Capital Sentences.

It suffices here to note that the cases cited on page 79 of Respondent's brief are not relevant to the sort of appellate review of sentencing that this Court approved in *Gregg*.¹³ Both *State v. Deutsch* and *State v. Ruppert* were reversed on grounds totally unrelated to the imposition of the death penalty: *Deutsch* for insufficiency of evidence of an aggravating circumstance;

¹³Many of the cases cited by Respondent in this section of its brief are unreported and therefore cannot properly be considered here. See p. 3-5.

Ruppert because of an improperly obtained waiver of the right to trial by jury.

In *State v. Palmore*, Respondent correctly asserts that the dismissal of a specification (and the death penalty) by a trial judge on a guilty plea "in the interests of justice" under Ohio Crim. R. 11(C)(3) was reversed by the Court of Appeals because there were no standards set forth for the dismissal. However, after Respondent filed its brief, a three judge trial panel, considering *Palmore* on remand, held that the decision of the Court of Appeals had been subsequently overruled by the Ohio Supreme Court in *State v. Weind*, *supra*, in which the dismissal practice was upheld. The present law in Ohio thus permits the elimination of the death penalty on a guilty plea if the trial judge concludes that the death penalty would not be "in the interests of justice." It is an understatement to say with Respondent and the Court of Appeals that, as Rule 11(C)(3) has now been authoritatively construed by the Ohio Supreme Court in *Weind* "the distinct specter of arbitrary and freakish application of capital punishment [condemned in *Furman*] then arises to haunt the Ohio procedure."

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1977

No. 76-6513

WILLIE LEE BELL,
Petitioner,

-v.-
STATE OF OHIO,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

**MOTION FOR LEAVE TO FILE BRIEF *AMICUS*
CURIAE AND BREIF *AMICUS CURIAE* OF THE
AMERICAN CIVIL LIBERTIES UNION OF OHIO
FOUNDATION, INC.**

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CURIAE AND STATEMENT OF INTEREST
OF AMICUS CURIAE

The American Civil Liberties Union of Ohio Foundation, Inc., respectfully moves this Court, pursuant to Supreme Court Rule 42(2), for permission to file the attached brief amicus curiae in support of Petitioner. The interest of Amicus Curiae as well as the reasons supporting the motion are set out in the following paragraphs.

(1) The American Civil Liberties Union of Ohio Foundation, Inc. (Foundation) is the separate litigative and educational arm of the American Civil Liberties Union of Ohio (Union). Both the Foundation and the Union are affiliated with the American Civil

Liberties Union. The parent and its affiliates comprise a nationwide organization of approximately 400,000 members dedicated to the protection of the rights enumerated in the Bill of Rights, and have been actively involved in the death-penalty controversy in judicial, legislative and educational forums in Ohio and elsewhere.

(2) Petitioner is one of seventy-six persons who have been sentenced to death under Ohio's new death-sentence scheme. Petitioner is one of twenty-five persons whose death sentences have been affirmed by the Ohio Supreme Court. Any decision on the constitutionality of Ohio's laws must take account of the statutory structure of Ohio's death-sentence scheme, the judicial gloss that has been placed upon it by the Ohio Supreme Court in a number of cases, the manner in which that gloss has been applied, and certain procedural aspects of Ohio's laws. As a result of its general concern about the death penalty and its specific involvement in Ohio death cases other than the case at bar, Amicus is uniquely suited to illuminate these issues.

(3) Amicus filed a brief with the Ohio Supreme Court in the case of State v. Carl Osborne, 50 Ohio St.2d 211, ___ N.E.2d ___ (1977), prior to any Ohio Supreme Court decisions interpreting Ohio's death-sentence statutes. In that brief, Amicus addressed the facial unconstitutionality of Ohio's statutes. Amicus has a continuing interest in the Osborne case, for the Ohio Supreme Court affirmed the conviction and death sentence. A decision by this Court in the case at bar will have a profound impact on the outcome of Osborne. Amicus has also filed with this Court a Motion for Leave to File a Brief Amicus Curiae (with brief annexed) in the case of Woods and

Reaves v. Ohio, No. 76-1308. In that brief, Amicus addresses the unconstitutional application of Ohio's statutes by the Ohio Supreme Court. A decision by this Court in the case at bar will also affect Woods and Reaves, in which Amicus has a continuing interest.

(4) Counsel for Petitioner has consented to the filing of the attached brief. The present motion is necessitated because counsel for the State of Ohio has refused consent.

WHEREFORE, movant prays that the attached brief amicus curiae in support of Petitioner be permitted to be filed with the Court.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

The interest of Amicus Curiae, American Civil Liberties Union of Ohio Foundation, Inc., has already been stated in the attached motion.

QUESTIONS PRESENTED

(1) Whether Ohio Rev. Code §2929.04(B) on its face imposes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States by giving no mitigating effect to factors such as youth, alcohol or drug intoxication, undue influence by others, mental or emotional abnormality falling short of psychosis or severe retardation, absence of prior criminal involvement, cooperation with the police, and the defendant's accessorial role?

(2) Whether Ohio Rev. Code §2929.04(B), as construed and applied by the Ohio Supreme Court, gives to the factors mentioned above the mitigating effect they must have under contemporary standards of decency?

(3) Whether Ohio Rev. Code §§2929.03(E) and 2929.04(B) violate the due process clause of the Fourteenth Amendment and impose cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments by placing on the defendant the burden of proving a mitigating factor by a preponderance of the evidence, thus mandating the death penalty when it is as likely as not that a mitigating factor exists and the defendant deserves to live?

(4) Whether Ohio Rev. Code §2929.03(C) violates the right to trial by jury guaranteed by the Sixth and Fourteenth Amendments

and imposes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments by totally precluding the jury from expressing an opinion whether, on the facts of a particular case, as measured by contemporary standards of decency, the defendant deserves to live or die?

(5) Whether the scope of review accorded death sentences by the Ohio Supreme Court is adequate under the Eighth and Fourteenth Amendments to insure that a death sentence is warranted by the facts of a particular case and is proportionate to sentences imposed in similar cases?

SUMMARY OF ARGUMENT

I. Description and facial unconstitutionality of Ohio's death-sentence scheme.

Understandably misreading Furman v. Georgia, 408 U.S. 238 (1972), Ohio's legislature enacted a death-sentence scheme that cuts discretion to the bone by mandating the death penalty when the defendant has been convicted of premeditated or felony murder along with an aggravating circumstance and the defendant thereafter fails to persuade the court by a preponderance of the evidence that a mitigating factor exists. As specified in Ohio Rev. Code §2929.04(B), the mitigating factors are (1) that the victim of the crime induced or facilitated it; (2) duress, coercion or strong provocation; and (3) that the crime was primarily the product of psychosis or mental deficiency short of the defense of insanity. On its face, §2929.04(B) ignores such obviously mitigating factors, see Harry Roberts v. Louisiana, 97 S. Ct. 1993, 1995 (1977), as youth, alcohol or drug intoxication, undue influence by others,

mental or emotional conditions falling short of psychosis or mental deficiency, absence of prior criminal involvement, cooperation with the police, and the defendant's role as an accessory rather than as the primary actor. Thus, §2929.04(B) subverts the requirement in Woodson v. North Carolina, 96 S. Ct. 2978, 2992 (1976), of a reliable determination that death is the appropriate penalty in a particular case.

II. Unconstitutional application of Ohio's death-sentence scheme.

A. Although the Ohio Supreme Court has not had occasion to apply the specified mitigating factors of victim inducement and strong provocation, it has construed and applied duress, coercion, and psychosis or mental deficiency. It has recognized that these mitigating factors are counterparts to defenses (duress, coercion, and insanity). It has also recognized that a verdict of guilty conclusively negates the defenses, thus precluding assertion of the mitigating counterparts. To keep the mitigating factors from being illusory, therefore, the Court has purported to define duress and coercion to include undue influence or domination by another, State v. Woods, 48 Ohio St.2d 127, 357 N.E.2d 1059 (1976), and mental deficiency to include any mental state or incapacity short of insanity. State v. Black, 48 Ohio St.2d 262, 358 N.E.2d 551 (1976). Further, purporting to add some factors not specified by §2929.04(B), the Court has stated that youth and absence of a prior record are relevant to determining duress or coercion, State v. Bell, 48 Ohio St.2d 270, 358 N.E.2d 556 (1976), and that youth is a primary factor in determining mental deficiency. Ibid. That these statements are no more than cosmetic is

demonstrated by the fact that the Court has upheld the death sentence in each of the twenty-five cases in which it has sustained the conviction even though some of the cases involved juveniles, persons who acted under the domination of others, persons who had no prior record, persons who had mental or emotional abnormalities including low intelligence, or a combination of these factors. Additionally, not even cosmetically has the Court given mitigating effect to alcohol or drug influence, cooperation with the police, or the defendant's accessorial role. See State v. Woods, *supra*; State v. Bell, *supra*; State v. Sandra Lockett, 48 Ohio St.2d 391, 358 N.E.2d 623 (1976).

B. The very factors that the Ohio Supreme Court has undervalued, trivialized or ignored have been recognized as justly calling for mitigation in the decisions of this Court, see, for example, Harry Roberts v. Louisiana, *supra*, in the Model Penal Code, and in the statutes and judicial decisions of a host of states. These sources establish the contemporary standards of decency against which Ohio's death-sentence scheme must be measured and found wanting.

III. Unconstitutionality of allocating burden of proof of mitigation to defendant.

As construed and applied by the Ohio Supreme Court, Ohio Rev. Code §§2929.03(E) and 2929.04(B) place on the defendant the burden of proving a mitigating factor by a preponderance of the evidence, thus mandating the death penalty when it is as likely as not that mitigation exists and the defendant deserves to live. State v. Downs, 51 Ohio St.2d 47, ___ N.E.2d ___ (1977). Viewed realistically rather than formalistically, absence of mitigation is an element of

capital murder under Ohio law, and the prosecution must therefore bear the burden of proof. In re Winship, 397 U.S. 158 (1970). But the prosecution must also bear the burden of proof even if absence of mitigation relates only to sentencing. The death penalty is qualitatively different from any sentence to imprisonment, regardless of length. Woodson v. North Carolina, *supra*. Accordingly, stringent standards of reliability are essential to insure that death is the appropriate punishment in a particular case. Ibid. Allocating the burden of proof to the defendant subverts reliability by mandating a death sentence when it is as likely as not that the defendant deserves to live. Such a result is "intolerable," Mullaney v. Wilbur, 421 U.S. 684, 703 (1975), whether measured by pure due process standards or by the standards of the Eighth Amendment.

IV. Unconstitutionality of precluding jury participation.

As a result of its misreading of Furman, the Ohio legislature enacted Ohio Rev. Code §2929.03(C) which remits the sentencing decision to the trial court and precludes even advisory participation by the jury, thus totally subverting the long-standing tradition of jury participation in the capital-sentencing process.

From a Sixth Amendment perspective, the kinds of issues raised at an Ohio mitigation hearing are well within the traditional role of juries in criminal cases, for the mitigating factors recognized by statute are counterparts to defenses. Moreover, if Ohio's law is viewed with a concern for substance rather than form, issues of mitigation go to guilt and must be jury-triable.

From an Eighth Amendment perspective, at least advisory jury participation should be

required even if mitigation relates exclusively to sentencing. Capital sentencing crucially implicates contemporary standards of decency, and the jury is a vital "link between contemporary community values and the penal system." Witherspoon v. Illinois, 391 U.S. 510, 519 n. 15 (1968). The conscience of the community is forged in the crucible of jury-room debate; it simply cannot be replicated in the mind and heart of a single judge or panel of three.

V. Eighth Amendment inadequacy of scope of review by Ohio Supreme Court.

Reliability is a fundamental concern in the constitutionality of a death-sentence scheme. Woodson v. North Carolina, *supra*, at 2992. Close review of death sentences by a state's highest court serves reliability by insuring that the death penalty is appropriate when measured by the facts of a specific case and that it is proportionate to sentences imposed in similar cases. Although the Ohio Supreme Court purports to review capital sentences to insure that they are fairly imposed, State v. Bayless, 48 Ohio St.2d 73, 357 N.E.2d 1035 (1976), in fact it does not. In no instance has the Court even attempted to compare a death-sentence case with any other case in which the death sentence was imposed or averted. In no instance has the Court remanded a case for reconsideration in light of definitions espoused by the Court long after the mitigation hearing had taken place. The Court has even affirmed a death sentence while complaining that it did not have the presentence report. State v. Woods, *supra*. Most importantly, the Court has adopted a standard of review that requires affirmance unless no reasonable mind could reach the same conclusion, State v. Edwards, 49 Ohio St.2d 31, 358 N.E.2d 1051 (1976), a

standard that avoids only the most blatant errors, a standard that precludes the Court from making the kind of judgment about comparative blameworthiness that Woodson requires. It is thus hardly surprising that the Court has affirmed the death sentence in every case in which it has upheld the conviction.

ARGUMENT

I. INTRODUCTION: RECENT HISTORY DESCRIPTION AND FACIAL UNCONSTITUTIONALITY OF OHIO'S DEATH-SENTENCE SCHEME.

Prior to January 1, 1974, the effective date of Ohio's new criminal code, eight crimes were punishable by death: first-degree murder (defined as purposely killing another either with premeditated malice, or by poison, or during the course of specified felonies), Ohio Rev. Code §2901.01 (Page 1954) (repealed, 1-1-74); killing another by maliciously obstructing a railroad, §2901.02; the killing of a guard or custodial officer by a prisoner, §2901.03; purposely killing a police officer who was in the execution of his duties, §2901.04; willfully killing the president, vice-president, or other person in line of succession, §2901.09; willfully killing a governor or lieutenant-governor, §2901.10; kidnapping for purposes of extortion or ransom a person who was not liberated unharmed prior to trial, §2901.27; and abduction resulting in death, §2901.28. The death penalty was mandatory for the two offenses involving governmental officials. For the remainder, either a death sentence or life imprisonment was imposed pursuant to a system of uncontrolled discretion that fell in the wake of Furman v. Georgia, *supra*.

On June 23, 1965, the Ohio Legislative Service Commission, the legislature's research and drafting arm, was directed to prepare a comprehensive study of Ohio's substantive criminal law. The project terminated six years later with the introduction of a criminal law reform bill that contained new death penalty provisions.^{1/} As approved by the Ohio House, the bill abolished both the mandatory death penalty for killing political officials and the existing system of uncontrolled discretion. In their stead, the House approved a bill closely patterned after Model Penal Code §210.6 (Prop. Off. Draft 1962). The House-approved measure specified a wide range of mitigating factors, but even that list was not exclusive, and all relevant evidence was admissible. The system was one of controlled discretion. See Memorandum from Ohio Legislative Service Commission to Ohio Senate Judiciary Committee, Sept. 11, 1972, at 2-3. The House-passed measure was pending in the Senate Judiciary Committee on the date that Furman was decided.

Concerned that the House version of guided discretion would not pass muster under Furman (a fear that was proved baseless by Gregg v. Georgia, 96 S. Ct. 2909 (1976), and companion cases), the Senate drastically narrowed the list of mitigating factors and

^{1/} Ohio maintains but sparse legislative histories. The discussion above is based on Lehman and Norris, Some Legislative History and Comments on Ohio's New Criminal Code, 23 CLEVE. ST. L. REV. 8 (1974). The discussion of the death penalty provisions is found id. at 15-23. The authors were, and still are, Ohio legislators, and Rep. Norris was a co-sponsor of the original bill.

removed all sentencing discretion. The Senate's version prevailed, and, as ultimately enacted, Ohio's statutes mandate the death penalty if certain conditions occur. The first condition is that the defendant must be charged with and found guilty of aggravated murder in violation of Ohio Rev. Code §2903.01 (1975).^{2/} The second condition is that the defendant must be charged with and found guilty of one or more of the seven additional aggravating circumstances enumerated in §2929.04(A).^{3/}

^{2/} Aggravated murder is defined as follows:

- a) No person shall purposely, and with prior calculation and design, cause the death of another.
- b) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated robbery, aggravated burglary or burglary, or escape.

Although the statute requires the mens rea of purpose to kill, even for felony murder, it has been interpreted by the Ohio Supreme Court so loosely that recklessness or even negligence may suffice. See State v. Sandra Lockett, 48 Ohio St.2d 48, 358 N.E.2d 1062 (1976).

^{3/} In the terminology used by Ohio lawyers, this is referred to as a "specification," in contrast to the basic "charge" of aggravated murder. The aggravating circumstances are (1) that the offense was the assassination of a specified office-holder or candidate for office; (2) that the offense was committed for hire; (3) that the offense was committed for the purpose of escaping detection, (Cont.)

Once these conditions have been met, the jury is discharged, §2929.03(C), and a mitigation phase begins. This phase is strictly a bench proceeding; there is no jury input whatsoever. A presentence investigation and psychiatric examination of the defendant are required, and the court must hear testimony and other evidence, if any. §2929.03(D). Then, §2929.03(E) calls upon the court to determine whether the defendant has established by a preponderance of the evidence, State v. Downs, 51 Ohio St.2d 47, 55, N.E.2d (1977), one or more of the mitigating factors specifically enumerated in §2929.04(B).^{4/}

^{3/} apprehension, trial or punishment for another offense committed by the offender; (4) that the offense was committed while the offender was a prisoner in a detention facility; (5) that the offender has previously been convicted of an earlier offense the gist of which was the purposeful killing or attempted killing of another, or that the offense involved the purposeful killing of or attempt to kill two or more persons; (6) that the victim was known by the offender to be a law enforcement officer, and either (a) the victim was engaged in his duties at the time of the offense or (b) it was the offender's specific purpose to kill a law enforcement officer; and (7) that the offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

^{4/} The mitigating factors are (1) that the victim of the offense induced or facilitated it; (2) that it is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion, or strong provocation; and (3) that the offense was primarily the product of the offender's psychosis or mental deficiency (Cont.)

If the court determines that the defendant has established none of the mitigating factors by a preponderance, the death penalty is mandatory. If the court finds that one or more of the factors have been established, the death penalty is precluded and a life sentence must be imposed.

Cases in which the death sentence has been imposed are reviewable as a matter of right in the intermediate appellate court. If that court affirms the death sentence, the case is reviewable as a matter of right in the Ohio Supreme Court. Since January 1, 1974, seventy-six persons have been sentenced to death in Ohio. Columbus Citizen-Journal, July 14, 1977, p. 13, col. 3. As of July 31, 1977, the Ohio Supreme Court had reviewed twenty-six death sentence cases. In one case, State v. James Lockett, 48 Ohio St.2d 71, 358 N.E.2d 1077 (1976), the Court set aside the conviction and sentence for evidentiary error unrelated to the penalty. In the other twenty-five cases, the Court affirmed the conviction and the death sentence.^{5/} In no case has the Ohio Supreme Court affirmed the conviction but set aside the death sentence.

^{4/} although such condition is insufficient to establish the defense of insanity.

^{5/} In order of decision, the cases are State v. Bayless, 48 Ohio St.2d 73, 357 N.E.2d 1035 (1976); State v. Strodes, 48 Ohio St.2d 113, 357 N.E.2d 375 (1976); State v. Woods, 48 Ohio St.2d 127, 357 N.E.2d 1059 (1976) (two cases); State v. Hancock, 48 Ohio St.2d 147, 358 N.E.2d 273 (1976); State v. Roberts, 48 Ohio St.2d 221, 358 N.E.2d 530 (1976); State v. Black, 48 Ohio St.2d 262, 358 N.E.2d 551 (1976); State v. Bell, 48 Ohio St.2d 270, 358 N.E.2d 556 (1976); State v. Bates, 48 Ohio St.2d 315, 358 N.E.2d 554 (1976); State v. Hall, 48 Ohio St.2d (Cont.)

In Woodson v. North Carolina, 96 S. Ct. 2978, 2992 (1976), this Court recognized that, in determining the constitutionality of a death-sentence scheme, a key issue is whether it permits a reliable "...determination that death is the appropriate punishment in a specific case." More importantly, observing that "...death is qualitatively different from a sentence of imprisonment, however long," this Court found "...a corresponding difference in the need for reliability...." Ohio's law is not identical to North Carolina's invalidated law. Nevertheless, both substantively and procedurally, it is unconstitutional on its face in terms of reliability.

From a substantive standpoint, Ohio's statutes ignore such obviously mitigating factors, see Harry Roberts v. Louisiana, 97 S. Ct. 1993, 1995 (1977), as youth, alcohol or drug intoxication, undue influence by others, mental or emotional abnormality

^{5/} 325, 358 N.E.2d 590 (1976); State v. Harris, 48 Ohio St.2d 351, 359 N.E.2d 67 (1976); State v. Royster, 48 Ohio St.2d 381, 358 N.E.2d 616 (1976); State v. Lytle, 48 Ohio St.2d 391, 358 N.E.2d 623 (1976); State v. Perryman, 49 Ohio St.2d 14, 358 N.E.2d 1040 (1976); State v. Sandra Lockett, 49 Ohio St.2d 48, 358 N.E.2d 1062 (1976); State v. Lane, 49 Ohio St.2d 77, 358 N.E.2d 1051 (1976); State v. Alberta Osborne, 49 Ohio St.2d 135, 359 N.E.2d 78 (1976); State v. Miller, 49 Ohio St.2d 198, 361 N.E.2d 419 (1977); State v. Carl Osborne, 50 Ohio St.2d 211, ____ N.E.2d ____ (1977); State v. Weind, 50 Ohio St.2d 224, ____ N.E.2d ____ (1977); State v. Jackson, 50 Ohio St.2d 253, ____ N.E.2d ____ (1977); State v. Downs, 51 Ohio St.2d 47, ____ N.E.2d ____ (1977); State v. Shelton, 51 Ohio St.2d 68, ____ N.E.2d ____ (1977); State v. Williams, 51 Ohio St.2d 112, ____ N.E.2d ____ (1977).

falling short of psychosis or mental deficiency, absence of prior criminal involvement, cooperation with the police, and the defendant's role as an accessory rather than as the primary actor. From a procedural standpoint, Ohio's statutes make the defendant bear the burden of proving, by a preponderance, the existence of one of the statutorily recognized mitigating factors, thus mandating the death penalty when it is as likely as not that a mitigating factor exists. State v. Downs, supra. Moreover, sentencing is the exclusive province of the bench, and the jury is therefore totally precluded from expressing an opinion whether, under contemporary standards of decency, the death penalty is justly or appropriately supported by the facts of the case. Finally, although all death cases are reviewed, Ohio's statutes are silent as to scope of review, and there is thus no legislative mandate that appellate courts review the evidence to insure that a death sentence in a particular case is warranted by the facts and that it is compatible with sentences imposed in similar cases. Whether these profound deficiencies in Ohio's death-penalty statutes have been cured by judicial interpretation is the critical issue in the case at bar. We address it under the headings that follow.^{6/}

^{6/} Although this brief focuses on the mitigation aspect of appropriateness of punishment, Ohio's statutes are also deficient in terms of aggravation. As noted earlier, §2929.04(A)(7) specifies felony-murder as an aggravating circumstance. With reference to this circumstance, Amicus respectfully suggests to the Court that the legislative formulation is arbitrary and irrational in violation of due process standards. As indicated above, the death penalty is conditioned on the defendant being found guilty of (Cont.)

to above, it is hard to confine a resolution of the issues to a single case, for what is involved is not only how Ohio's law was applied in the isolated setting of one case, but also the rationality, fairness, and basic decency of Ohio's statutory scheme as construed and applied by the Ohio Supreme Court in a wide range of cases. Gregg v. Georgia, supra at 2938. Amicus respectfully submits that, even considered with its judicial gloss, Ohio's law still affronts the concerns underlying Woodson v. North Carolina, supra; Stanislaus Roberts v. Louisiana, 96 S.Ct. 3001 (1976); and Harry Roberts v. Louisiana, supra, and is therefore unconstitutional.

6/ allegations of purpose and calculation -- for example, that the killing was for hire. §2929.04(A) (2). Then, and only then, has capital murder been alleged. There can be no rational justification for saying that a planned, cold-blooded killing requires a wholly new element to become capital murder, but that a felony-killing becomes capital merely by realleging the identical felony-killing as an aggravating specification. Whatever the standards of due process may be in a run-of-the-mill criminal case, surely a higher degree of rationality and fairness must be achieved by the legislature when its formulation results in the penalty of death. Cf. Woodson v. North Carolina, supra.

Amicus concedes that this issue was not raised below. It was however, presented to the Ohio Supreme Court at pp. 9-10 of a brief filed by Amicus in State v. Carl Osborne, supra note 5. That Court totally ignored the issue in its Osborne opinion and has continued to ignore the issue in every subsequent capital opinion. That the issue is highly significant is apparent from the fact that most of the cases reviewed to date by the Ohio Supreme Court have involved a charge of felony-murder with an aggravating specification of the identical felony-murder.

- A. As construed and applied by the Ohio Supreme Court, the mitigating factors explicitly recognized by Ohio Rev. Code §2929.04(B) are inordinately narrow, and little or no mitigating effect is given to such factors as youth, alcohol or drug intoxication, undue influence by others, mental or emotional abnormality falling short of psychosis or severe retardation, absence of prior criminal involvement, cooperation with the police, and the defendant's accessorial role.

Ohio Rev. Code §2929.04(B) explicitly recognizes three categories of mitigating factors. A brief consideration of each category and, where available, its judicial gloss will show that Ohio's scheme is virtually bereft of mitigation.

(1) Ohio Rev. Code §2929.04(B)(1) deems mitigating that the victim of the offense induced or facilitated it. This mitigating factor has not arisen in any reported case. Nor is it ever likely to arise, for it is illusory. In the absence of judicial interpretation, we must make the educated guess that the factor is limited to mercy killing, for that seems to be its plain meaning. It strains credulity to posit that a mercy killer would even be charged with aggravated murder, let alone be convicted of it. Of greater importance, however, is the fact that no mitigating factor becomes relevant until the defendant has also been convicted of one or more of the aggravating specifications listed in §2929.04(A). The aggravating circumstances, however, are so inconsistent with mercy killing, that conviction of any

aggravating specification will preclude the defendant from claiming mercy killing. To illustrate the point, we refer to §2929.04(A)(7)'s aggravating specification of felony-murder which is the most common form of aggravation under Ohio law. One who has been convicted of aggravated murder and an additional specification of felony-murder of the same victim will simply never be able to assert mercy killing. What is true of the aggravating circumstance of felony-murder is also true of the other aggravating circumstances. Hence, mitigating inducement is illusory.^{7/}

^{7/} The statements made above may have to be tempered a bit in light of the unreported opinion of the Ohio Court of Appeals for the Fifth District (Ashland County) in the consolidated cases of State v. Hines, No. CA-634 (Feb. 25, 1977); and State v. Lucas, No. CA-639 (Feb. 25, 1977). The defendants were inveigled into a robbery scheme by one Rice. Rice introduced the defendants to Vanover as sellers of marijuana which Vanover wanted to buy. Learning from Rice that Vanover would be armed, the defendants armed themselves. When Vanover realized that he had been set up for a robbery, he attempted to flee. To stop him, one of the defendants fired into the air. Vanover then fired at the defendants who returned the fire, killing Vanover at close range. The Court of Appeals reversed the death sentences, holding as a matter of law that the victim had induced or facilitated the felony-murder by his willingness to participate in an unlawful transaction and by being armed. Id. at 52-3. The Court also threw into the balance that the defendants had been inveigled by Rice (who had become a witness for the State), id. at 56, and that the defendants were "...self indulged, drug oriented, youthful failures of marginal intelligence but with no history or pattern of violence." Id. at 57.

(Cont.)

(2) Ohio Rev. Code §2929.04(B)(2), a section involved in the case at bar, provides for mitigation if "it is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion, or strong provocation." This section was first construed and applied by the Ohio Supreme Court in State v. Woods, 48 Ohio St.2d 127, 357 N.E.2d 1059 (1976) (Petition for a Writ of Certiorari filed March 21, 1977, No. 76-1308). In Woods, the Court recognized (1) that the most common type of aggravated murder in Ohio is felony-murder; (2) that, whether or not duress and coercion are defenses to murder in general, they are defenses in Ohio to the felony that underlies felony-murder; (3) that a felony-murder defendant who prevails on the claim of duress in Ohio is not guilty of a capital offense; (4) that, if a defendant has been found guilty of felony-murder (as he must for the offense to be capital), the verdict necessarily decides beyond a reasonable doubt that duress did not exist; (5) that such a verdict would preclude the defendant from establishing at the mitigation hearing that he was under duress; and (6) that, unless the terms "duress" and "coercion", as mitigating factors, were given a meaning

7/ Although Amicus applauds the result of this case, it is inconsistent with a plethora of Ohio Supreme Court decisions that will be discussed later in this brief, importantly including the decision in the instant case. Amicus has learned, however, that the prosecution did not appeal, thus precluding further review.

Even if the opinion were not inconsistent with Ohio Supreme Court decisions, it would have little, if any, impact. In addition to being unreported, it deals with a rarely occurring fact situation.

different from their meaning as defensive factors, mitigating duress and coercion would be a "virtual nullity." 48 Ohio St.2d at 135, 357 N.E.2d at 1065. Accordingly, the Court interpreted mitigating duress and coercion to include domination by another or undue influence. 48 Ohio St.2d at 136-7, 357 N.E.2d at 1066.

In applying its own definition, however, the Court eviscerated it. Ignoring the evidence that Woods was easily led and dominated by others, that he had no prior record, and that he probably would not have committed the crime had he not been under duress, 48 Ohio St.2d at 134, 357 N.E.2d at 1064, the Court held, seemingly as a matter of law, that Woods was not under duress, as newly defined, because he did not take advantage of an opportunity to abandon the robbery, refrain from shooting, surrender to police, or flee. 48 Ohio St.2d at 138, 357 N.E.2d at 1066.

The approach taken by the Ohio Supreme Court in Woods (generous definition followed by eviscerating application) was continued in the case at bar, State v. Bell, 48 Ohio St.2d 270, 358 N.E.2d 556 (1976). In Bell, the Court purported to add to the factors specifically recognized in §2929.04(B) by holding that youth and absence of a prior record were relevant considerations.^{8/} 48 Ohio St.2d at 281, 358 N.E.2d at 564. Then,

8/ The Court's statement in Bell regarding youth and absence of a prior record contradicts the statement it made less than a month before in State v. Bayless, 48 Ohio St.2d 73, 87 n. 2, 357 N.E.2d 1035, 1046 n. 2 (1976), that "The major differences [between the statutory schemes of Ohio and Florida] are that the Florida statute permits consideration (Cont.)

ignoring the evidence that Bell was 16, 48 Ohio St.2d at 270, 358 N.E.2d at 559, and that he was easily led by his older companion, Hall, the Court affirmed the death sentence on the ground that Bell did not get away from Hall when he could have, and that he joined Hall in another criminal venture the next day. 48 Ohio St.2d at 282, 358 N.E.2d at 364-65.

The Court's most recent application of mitigating duress or coercion came in State v. Weind, 50 Ohio St.2d 224, 231, ___ N.E.2d ___, (1977). There, the Court stated that, "although the defendant may have acted under a strong domination or persuasion," the mitigating factor had not been proved in light of other evidence "which suggests that his acts were voluntary."^{9/}

^{8/} of the age and prior criminal record of the defendant, of more broadly defined mental and emotional disturbances and impairments, and of the fact that the defendant was an accomplice with only a minor role in the crime."

It should also be noted that the defendant in State v. Woods, supra, had no prior record, but that fact availed him nothing.

^{9/} See also the companion case of State v. Carl Osborne, 50 Ohio St.2d 211, ___ N.E.2d ___ (1977), in which the evidence at the mitigation hearing established the likelihood that the defendant had acted under the strong influence of his mother at whose behest he had killed her paramour's wife. In its opinion, the Ohio Supreme Court did not even take the trouble to state the evidence of mitigation. Amicus' knowledge of this case comes from its participation in the Ohio Supreme Court proceedings. Amicus has been informed by counsel for Osborne that a Petition for a Writ of Certiorari is being prepared.

In neither Woods, Bell, nor Weind did the Court recognize that it had undone its own effort to expand the definition of duress and coercion and had made the mitigating factor virtually illusory. In the first place, one who is easily led or unduly influenced by another is simply not likely to abandon the relationship, for maintaining it is part and parcel of the condition. Thus, it is hard to imagine a case the facts of which would ever satisfy the Court's insistence on abandonment. Moreover, by requiring abandonment as an element of mitigating duress or coercion, the Court has read into the mitigating factor an element of the defense, State v. Good, 110 Ohio App.415, 165 N.E.2d 28 (1960) (syllabus 4), thus collapsing the distinction between the two as a matter of law. Finally, the very conviction for capital murder assures that the mitigating factor will fail under Weind, for it establishes beyond a reasonable doubt that the defendant acted voluntarily.

In Woods, the Ohio Supreme Court claimed to be concerned lest it interpret the mitigating factor of duress or coercion so narrowly as to make it a virtual nullity. Thus, it defined the factor to include undue influence or domination by another. Yet, in applying its own definition in Woods, Bell and Weind, it has done precisely what it sought to avoid. Once the felicitous verbiage is pierced and attention is paid to hard results, it is clear that mitigating duress and coercion are useless. As applied by the Ohio Supreme Court, neither concept permits the sentencer to make the kind of judgment about comparative blameworthiness that Woodson and the two Roberts cases require. The Woods and Bell cases are the clearest evidence of this. Each dealt with an incident that involved joint participants

of significantly different blameworthiness. Yet, each participant was sentenced to death, and the Ohio Supreme Court upheld each death sentence.

The third mitigating factor mentioned in §2929.04(B)(2) is "strong provocation." This factor has not been interpreted in any reported case, so we cannot be certain of its scope. Nevertheless, it is a fact that strong provocation cannot exist in conjunction with some of the aggravating circumstances -- for example, that the killing was for the purpose of escaping detection -- and it is unlikely that "strong" provocation would exist in conjunction with others -- for example, killing for hire or, to refer again to the most common example, felony-murder. Beyond this, however, is the fact that, under Ohio Rev. Code §2903.03, a killing that would otherwise be murder is reduced to manslaughter if it resulted from "...extreme emotional stress brought on by serious provocation reasonably sufficient to incite [the defendant] into using deadly force..." In the absence of relevant case law, the relationship between reductive provocation and mitigating provocation cannot be illuminated. It is clear, however, that, if the Ohio Supreme Court either interprets or applies mitigating provocation narrowly, it will be swallowed up by reductive provocation and will cease to exist. Given the already narrow application of duress and coercion, that is quite likely to occur.

(3) Ohio Rev. Code §2929.04(B)(3), also involved in the case at bar, treats as mitigating that the crime "...was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity." The question raised by this section is whether its definition of

mitigating mental condition differs in any significant respect from Ohio's case-law definition of insanity as a defense. If it does not, then a verdict that the defendant is guilty of capital murder, which necessarily entails a finding beyond a reasonable doubt that he was sane, would effectively preclude the defendant from asserting this form of mitigation. Cf. State v. Woods, supra at 135, 357 N.E.2d at 1065.^{10/}

From the face of §2929.04(B)(3), it is clear that the legislature intended to distinguish mitigating from exculpating mental condition. The question, however, is not what the legislature intended, but whether it succeeded, and, if not, whether the legislative failure has been rectified by judicial interpretation and application.

Ohio's insanity defense is defined as follows:

One accused of criminal conduct is not responsible for such criminal conduct if, at the time of such conduct, as a result of mental disease or defect, he does not have the capacity either to know the wrongfulness of his conduct or to conform his conduct to the requirements of the law.

State v. Staten, 18 Ohio St.2d 13, 247 N.E.2d 293 (1969)(syllabus 1). This definition surely suggests no easy differentiation

^{10/} In State v. Humphries, 51 Ohio St.2d 95, N.E.2d ____ (1977), the Ohio Supreme Court held that once the defendant offers some evidence in support of the insanity defense, the prosecution must prove beyond a reasonable doubt that the defendant was sane at the time of the act.

from mitigating mental condition (whether the crime "was primarily the product of the offender's psychosis or mental deficiency"). Thus, if there is any difference between them, it must reside in Ohio's case law.

The Ohio Supreme Court has dealt with mitigating mental condition in a number of capital cases. Far from articulating a distinction between mitigation and exculpation, however, the cases, taken as a whole, so confound matters that, either the mitigating mental condition is illusory, engulfed by Ohio's insanity defense, or it is unconstitutionally vague as a result of the very judicial gloss that has been given to it.

In State v. Bayless, *supra*, the Court recognized that the words "psychosis or mental deficiency" do not cover all "mental disorders," 48 Ohio St.2d at 87, 357 N.E.2d at 1046, and it limited "mental deficiency" to low intelligence or retardation. 48 Ohio St.2d at 95-6, 357 N.E.2d at 1050-51. This traditionally narrow definition means that "mental deficiency" is a "mental disease or defect" as those words are used in defining the defense of insanity. Because the same is obviously true of "psychosis," Bayless blurs, rather than sharpens, the distinction between mitigation and exculpation.

Perhaps recognizing that it had failed to make a crucial distinction in Bayless, the Court tried again in State v. Black, 48 Ohio St.2d 262, 358 N.E.2d 551 (1976). There, the Court conveniently ignored what it had said less than a month before in Bayless and stated that the statutory language accorded the sentencer "the broadest possible latitude in the examination of the defendant's mental state or mental capacity," and that "any mental state or incapacity may

be considered" short of the defense of insanity. 48 Ohio St.2d at 268, 358 N.E.2d at 555-56. Indeed, the Court even refused to define "psychosis or mental deficiency" on the ground that "to define such terms is to narrow them," 48 Ohio St.2d at 268, 358 N.E.2d at 556, either failing to recognize or ignoring the obvious: that not defining the terms abandons each sentencing judge to an uncharted sea that most conduces to the freakish or wanton imposition of the death penalty. Cf. United States v. Park, 421 U.S. 658, 679-82 (1975) (dissenting opinion by Stewart, J.) But that is not the only deficiency in the Court's formula. Of far greater consequence is the fact that the Court has applied the broad language of Black in the narrowest way (doing to mitigating mental condition precisely what it had done to mitigating duress in Woods, Bell and Weind, *supra*), thus destroying the very distinction it purported to draw in Black between mitigation and exculpation.

As already noted, the Court's expansive statement in Black is inconsistent with its earlier statement in Bayless. It is also inconsistent with the holding in Bayless. Bayless was dull normal, emotionally and culturally deprived, and subnormal in emotional control and conscience. 48 Ohio St.2d at 94, 357 N.E.2d at 1049-50. Had the Court meant what it said in Black, it would have had to reconsider Bayless. Nevertheless, having interpreted mitigating mental condition in Black much more broadly than it had in Bayless, the Court did not reconsider Bayless and apply the newly formulated standard to its facts. Rather, it ignored Bayless altogether, relegating it to the earlier and less generous standard. This could, of course, be simply a matter of inadvertence. On the other hand, it could be an indication that the broad language of

Black is only cosmetic. A consideration of cases decided since Black strongly supports the latter.

In the case at bar, the Court purported to continue its broad interpretation of psychosis or mental deficiency by holding not only that the defendant's age could be considered in determining whether he had a mitigating mental condition, but also that age was a "primary factor" in the determination. 48 Ohio St.2d at 282, 358 N.E.2d at 565. It is, of course, true that old age may cause brain deterioration and consequent mental deficiency. But it is hardly likely that a senile person would even be charged with aggravated murder, let alone be convicted of it. In terms of the real world, it is youth, rather than old age, that will be asserted as mitigating in a capital case. The Court did say in Bell that youth, too, was a "primary factor" in determining mitigating mental condition, but the Court did not explain how that could possibly be the case, and no obvious explanation suggests itself. Moreover, as already noted in the discussion of duress, Bell was 16 at the time of the crime. Yet, having posited youth as a "primary factor" in determining mitigating mental condition, the Court upheld the death sentence. Not only did the Court ignore the defendant's youth, it ignored the additional evidence that Bell had subnormal intelligence, see Petition for Writ of Certiorari at 23, that he lacked family or other adequate supervision, that he had been sent to a school for abnormally difficult children, that he had been under the influence of mescaline and marijuana at the time of the crime (R. 503, 506-7), and that he had taken drugs daily for three years preceding the crime (R. 503).

But the story does not end with Bell. In State v. Harris, 48 Ohio St.2d 351, 359 N.E.2d 357 (1976), the Court upheld a death sentence imposed on a juvenile sociopath; in State v. Royster, 48 Ohio St.2d 381, 358 N.E.2d 616 (1976), it affirmed the sentence in a case involving a defendant whose I.Q. scores of 75, 61 and 54 were attributed to "developing characteristic traits" and unwillingness to cooperate, id. at 389-90, 358 N.E.2d at 622; in State v. Edwards, 49 Ohio St.2d 31, 358 N.E.2d 1051 (1976), it sustained a sentence imposed on one who was of below average intelligence and educationally deficient; and in State v. Sandra Lockett, 49 Ohio St.2d 48, 358 N.E.2d 1062 (1976), it upheld a death sentence imposed on an accomplice (the driver of the getaway car) whose I.Q. was variously evaluated as slightly above average, low average, and borderline mental retardation.

Had the Court really meant what it said in Black, it is inconceivable that it would not have set aside the death sentence in at least one of these cases, especially Bell. That it did not do so in any of the cases is the most eloquent evidence that the generous language of Black is a sham. The inevitable result is, as stated earlier, either that the mitigating mental condition is illusory, devoured by Ohio's insanity defense, or that if there is a difference between the two, it has been so poorly articulated by the Ohio Supreme Court that the mitigating condition cannot be applied even-handedly as a result of the confusing judicial gloss that has been given to it.

(4) In the preceding subdivisions of part II A of this Brief, we addressed the mitigating factors explicitly enumerated in Ohio Rev. Code §2929.04(B) in order to demonstrate that, as interpreted and applied

by the Ohio Supreme Court, the factors are either illusory or intolerably narrow at best. In the present subdivision, we address other language of §2929.04(B) which requires the sentencer to determine whether, "considering the nature and circumstances of the offense and the history, character, and condition of the offender," a statutory mitigating factor has been established by the defendant. Under cover of the quoted words, the Ohio Supreme Court has stated, as indicated above, that the defendant's youth is relevant to determining mitigating duress, coercion or mental condition; that absence of a prior record is relevant to the determination of duress and coercion; that duress includes undue influence or domination by another; and that mental deficiency is to be broadly defined. The insubstantiality of these statements is manifest, for in no case has the Court set aside a death sentence where the defendant was young, had no prior record, acted under the influence of another, or had any mental abnormality. Moreover, in no case has the Court even deemed relevant that the defendant was intoxicated, State v. Bell, supra, or cooperated with the authorities, ibid., or played but an accessory's role, State v. Sandra Lockett, supra. Finally, in no case has the Court regarded any combination of these factors as mitigating. See State v. Woods, supra; State v. Bell, supra; State v. Sandra Lockett, supra. Thus, it is clear that, although the quoted words might, on their face, be regarded as a constitutionally saving grace, they avail nothing as applied by the Court.

(5) The teaching of the second round of death penalty cases in conjunction with Harry Roberts v. Louisiana, supra, is twofold: that a capital-sentencing scheme of broad mitigation coupled with guided discretion is

constitutional, but that a scheme without any mitigation is not. On a spectrum running from the valid laws of Georgia, Florida and Texas, at one end, to the unconstitutional laws of North Carolina and Louisiana, at the other, Ohio's law lies quite close to the latter, albeit not at the identical point. Whether it lies too close to that point to pass constitutional scrutiny is a critical issue in the case at bar. We address that issue immediately below.

- B. Contemporary standards of decency require that mitigating effect be given to the factors that are ignored or grossly undervalued by Ohio's death-penalty scheme.

In Harry Roberts v. Louisiana, supra at 1995, this Court summarized its prior holdings in the following terms:

In Woodson v. North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944, this Court held that "...the fundamental respect for humanity underlying the Eighth Amendment...requires consideration of the character and record of the individual offender and the circumstances of a particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." In [Stanislaus] Roberts v. Louisiana, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974, we made clear that this principle applies even where the crime of first-degree murder is narrowly defined.

After observing that there was a legitimate interest in dealing harshly with aggravated murders, this court continued, in terms directly applicable to the case at bar:

But it is incorrect to suppose that no mitigating circumstances can exist when the victim is a police officer. Circumstances such as the youth of the offender, the absence of any prior conviction, the influence of drugs, alcohol or extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct are all examples of mitigating facts which might attend the killing of a police officer and which are considered relevant in other jurisdictions.

As we emphasized repeatedly in [Stanislaus] Roberts and its companion cases decided last Term, it is essential that the capital sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense (97 S.Ct. at 1995-96) (footnotes omitted; emphasis added).

To be constitutional, therefore, a death-sentence scheme must, in addition to identifying aggravating circumstances, afford the sentencer a "meaningful opportunity" to assess and weigh in the balance "the past life and habits of a particular offender" as well as his "character and propensities." Woodson, supra at 3006. It is against these standards that Ohio's scheme must be measured.

Given the polar extremes at which the decided cases lie, it has not yet been necessary for this Court to identify the mitigating factors that are constitutionally indispensable. However, the enumeration in

Harry Roberts, supra, is simply too pointed to be ignored, and would, standing alone, be ample basis for declaring unconstitutional Ohio's scheme which, as the case at bar compellingly demonstrates, trivializes to the vanishing point almost all of the factors specifically mentioned by this Court. But if further support is necessary, Amicus suggests that it may be found in a consideration of the statutes that were upheld in Gregg v. Georgia, supra; Proffitt v. Florida, 96 S.Ct. 2960 (1976); and Jurek v. Texas, 96 S.Ct. 2950 (1976), and in the statutes of other states, as well. This Court itself observed in Woodson, supra at 2987, that what was at stake in Eighth Amendment death-penalty litigation was "ascertaining contemporary standards of decency," and that "legislative measures adopted by the people's chosen representatives weigh heavily" in making that judgment.

For ease in dealing with the procedures of Georgia, Florida and Texas, we shall assume that the defendant has been tried by jury. Under Georgia's bifurcated procedure, the first stage involves guilt determination, and the only question is whether the defendant committed an offense punishable by death. Gregg, supra at 2920, 2936. If that question is answered in the affirmative, the trial moves to the second stage -- sentencing -- which also takes place before the jury. The jury is first asked to determine whether one of ten specified aggravating circumstances has been proved beyond a reasonable doubt. If the answer is no, the death penalty is precluded. Id. at 2919, 2936. If the answer is yes, however, the death penalty is not mandatory; rather it resides with the discretion of the jury. In exercising that discretion, the jury must consider mitigating circumstances. Id. at 2919, 2921, 2936. However, the jury need not find any

mitigating circumstance in order to make a binding determination of mercy. Id. at 2936. Although only one mitigating circumstance appears to be specified by statute -- absence of a prior record, id. at 2920 -- it is clear that the scope of mitigation is wide. "The defendant is accorded substantial latitude as to the types of evidence that he may introduce." Ibid.

...the jury's attention is focused on the characteristics of the person who committed the crime: Does he have a record of prior convictions for capital offenses? Are there any special facts about this defendant that mitigate against imposing capital punishment (e.g., his youth, the extent of his cooperation with the police, his emotional state at the time of the crime) (id. at 2936) (footnote omitted) (emphasis added).

That Georgia's mitigating circumstances are not statutorily specified makes it somewhat hard to control the sentencer's discretion. That fact, however, was not viewed by this Court as a constitutional deficiency:

So long as the evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision (id. at 2939) (emphasis added).

Under Florida's procedure, the defendant's guilt of a capital offense is determined at the first stage of a bifurcated trial. The presentence stage, which occurs before the jury, deals with aggravating and

mitigating circumstances. Proffitt, supra at 2965. Both aggravating and mitigating circumstances are specified by statute. The specified mitigating circumstances are (1) absence of a significant criminal history; (2) influence of extreme mental or emotional disturbance; (3) victim's consent or participation; (4) defendant's minor role as an accomplice; (5) extreme duress or substantial domination by another person; (6) substantially impaired mental capacity; and (7) defendant's age at the time of the crime. Ibid. This list, however, is apparently not exclusive. Id. at 2964, 2965 n. 8. After hearing the aggravating and mitigating evidence, the jury decides by majority vote whether the defendant should live or die. The jury's decision, however, is advisory. Id. at 2965. It is the trial judge who has the final authority. In exercising that authority, however, the judge is also required to balance the aggravating and mitigating circumstances, he is required to make written findings in support of any death sentence, and he may reject the jury's recommendation of life only if "the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ." Ibid., quoting Tedder v. State, 322 So.2d 908, 910 (Fla. 1975).

Under the bifurcated procedure in Texas, the first stage is devoted to ascertaining whether the defendant committed a capital offense which, under Texas law, is defined in terms of aggravating circumstances. Jurek, supra at 295. Once the defendant has been found guilty, the presentence stage is reached. At this stage the jury is required to answer three questions: (1) whether the defendant killed deliberately and with reasonable expectation that death would result from his act; (2) whether it is probable that the defendant will commit violent acts constituting a continuing threat to society;

and (3) if raised by the evidence, whether the killing was an unreasonable response to provocation by the victim. Ibid. Only if the jury unanimously finds that the prosecution has proved an affirmative answer to each of these questions beyond a reasonable doubt, must the death sentence be imposed. Ibid.

Although the Texas statutory procedure does not mandate a consideration of mitigating factors, the Texas Court of Criminal Appeals has construed the second statutory question (probability of future violent acts) to permit a wide-ranging inquiry into mitigating factors such as prior record, prior efforts at rehabilitation, age, duress, mental or emotional pressure, and whether the defendant acted under the domination of another. Id. at 2957. As a result, the defendant is permitted "to bring to the attention of the jury whatever mitigating circumstances he may be able to show." Id. at 2956. Squarely for that reason, the Texas statute was upheld by this Court. Harry Roberts v. Louisiana, supra at 1996 n. 6.11/

11/ Amicus anticipates that the State of Ohio will attempt to analogize Ohio's law to that of Texas by arguing (1) that, although the factors of youth and absence of a prior record have no independent mitigating effect in Ohio, the Ohio Supreme Court has said that they can be considered in determining whether a statutorily enumerated mitigating factor exists; (2) that, under Texas law, mitigating factors such as youth also have no independent mitigating effect, but can only be considered in the context of the second statutory question; and (3) that the Ohio and Texas laws are therefore substantially similar.

To the extent that the anticipated argument rests on what the Ohio Supreme Court has said (Cont.)

Although the Georgia, Florida and Texas procedures differ in some respects, they are remarkably similar in requiring the sentencer to consider the broadest range of mitigating circumstances including the very factors that Ohio's statute, as interpreted by the Court below, grossly devalues or ignores. It is

11/ (generous definition), it is fully answered by what the Court has done (eviscerating application). More importantly, however, the argument fundamentally misconceives the operation of a Texas mitigation hearing. The very ambiguity of the second statutory question allows for "play in the joints," Crump, Capital Murder: The Issues in Texas, 14 HOUSTON L. REV. 531, 555 (1977), as a result of which the Texas mitigation hearing is a wide-open inquiry into justness of punishment or whether the defendant is rehabilitable based on all of the facts of the case. All evidence relating to mitigation is admissible, see id. at 561, et seq., and Texas defense lawyers have even been permitted to argue against the death penalty in concept. Id. at 577. Thus, although Texas statutory law ostensibly confines mitigation evidence to a narrow channel, mitigation hearings are in fact conducted in precisely the opposite way.

Beyond this, however, is the fact that the Ohio Supreme Court has yet to say even cosmetically that factors such as intoxication, drug influence, cooperation with the police and accessoryship can be considered for any mitigating purpose. Finally, there is the stark fact that the Texas procedure is slanted toward life while Ohio's is slanted toward death. Under the Texas procedure, the death penalty is precluded unless the prosecutor can persuade all jurors beyond a reasonable doubt of an affirmative answer to the second question -- that is, that the death penalty is just under the circumstances. Under Ohio's procedure, by contrast, the death penalty is mandatory unless the defendant persuades the sentencer by a preponderance that a statutory mitigating factor exists.

hardly surprising that these factors have been regarded as justly calling for mitigation by the Florida legislature and the courts of Georgia and Texas. The same factors and others have been recognized as mitigating in the Model Penal Code §210.6(4), see Gregg, supra at 2935 n. 44, and in the legislation of other states, as this Court noted in Harry Roberts v. Louisiana, supra at 1996.^{12/}

Measured by any relevant indicium of contemporary standards of decency, Ohio's law is woefully inadequate. As the decisions of the Court below testify, neither singly nor in combination will matters widely recognized as mitigating stay Ohio's death penalty on its appointed rounds. Although Ohio's law is not identical to the invalidated laws of North Carolina and Louisiana, Amicus submits that it is too close to survive constitutional scrutiny. The matter is, of course, one of degree. But it is also one of life or death, and it bears repeating that:

^{12/} Given this Court's recognition of the breadth of mitigation in other states, Amicus deems it unnecessary to include in this brief a comprehensive compilation of statutes. It is worth noting, however, that youth has been regarded as a factor precluding the death sentence even in statutes that have been declared unconstitutional for failing to embrace other mitigating factors. See Cal. Penal Code §190.3(a) (Supp. 1976), invalidated in Rockwell v. Superior Court, 18 Cal. 3rd 420, 556 P.2d 1101 (1976); N. Mex. Stat. Ann. §40A-29-2 (Supp. 1975), invalidated in State v. Rondeau, 89 N. Mex. 408, 553 P.2d 688 (1976); and N.Y. Penal Law §125.27 (1974), invalidated in People v. Velez, 88 Misc.2d 378, 388 N.Y. Supp.2d 519 (Sup. Ct. Trial Term, 1976).

...the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, supra at 2992. Ohio's intolerably narrow structure of mitigation, a structure attributable squarely to a misreading of Furman, subverts the value of reliability. It ignores a person's "iniquely individual" characteristics and treats him or her as one "of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty." Id. at 2991. Amicus respectfully asks this Court to hold that Ohio's law is unconstitutional.

III. AS CONSTRUED AND APPLIED BY THE OHIO SUPREME COURT, OHIO REV. CODE §§2929.03(E) AND 2929.04(B) VIOLATE DUE PROCESS OF LAW AND IMPOSE CRUEL AND UNUSUAL PUNISHMENT BY PLACING ON THE DEFENDANT THE BURDEN OF PROVING A MITIGATING FACTOR BY A PREPONDANCE OF THE EVIDENCE, THUS MANDATING THE DEATH PENALTY WHEN IT IS AS LIKELY AS NOT THAT A MITIGATING FACTOR EXISTS AND THE DEFENDANT DESERVES TO LIVE.

Ohio Rev. Code §2929.03(E) provides in relevant part that if the sentencing court "finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established

by a preponderance of the evidence, it shall impose sentence of death on the offender." Section 2929.04(B) provides that the death penalty is precluded when the sentencing judge finds that a mitigating circumstance "is established by a preponderance of the evidence." In State v. Downs, 51 Ohio St.2d 47, ____ N.E.2d ____ (1977), the Ohio Supreme Court upheld the constitutionality of these sections despite the fact that, "as to the burden of persuasion, it is apparent from the statute that if the evidence is in equilibrium, the risk of non-persuasion falls upon the defendant." Id. at 55, ____ N.E.2d at ____.

In Ohio, a specified aggravating factor is an essential element of capital murder, §2929.03(B) and (C), and the prosecution is therefore constitutionally obliged to prove it beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970). Yet, under Ohio's scheme, aggravation and mitigation are really reverse sides of the same coin: determining whether the offense is non-capital murder, in which event the death penalty is precluded, or whether it is capital, in which event the death penalty is mandatory. In effect, Ohio law recognizes the following separate offenses of murder: simple murder (§2903.02), punishable by fifteen years to life (§2929.02); aggravated murder (§2903.01), punishable by life imprisonment (§2929.02); doubly aggravated murder (§§2903.01 and 2929.04(A)) with a mitigating factor (§2929.04(B)), also punishable by life imprisonment (§2929.02); and capital murder, i.e., doubly aggravated murder without any mitigating factor, for which the death penalty is mandatory. Once this structure is recognized, it is clear that absence of mitigation is an element of capital murder, the risk of non-persuasion has to be allocated to the prosecution, Mullaney v.

Wilbur, 421 U.S. 684 (1975); In re Winship, supra, and Ohio's statutes are unconstitutional.^{13/} But the result should be no different even if absence of mitigation is treated solely as an element of punishment rather than as an element of guilt.

In an amicus brief which we have sought leave to file in support of the Petition for a Writ of Certiorari in Woods and Reaves v. Ohio, No. 76-1308, we argued that the reach of Winship was extended in Mullaney when this Court applied Winship to a factor (provocation reducing murder to manslaughter) which, under Maine law, was not an element of guilt, but served solely to differentiate "punishment categories." Mullaney, supra at 689. Although we remain convinced of the validity of that argument, we recognize that it rests on an interpretation of Mullaney that is not congenial to a majority of this Court. See Patterson v. New York, 45 U.S.L. Week 4708 (U.S. June 17, 1977). We submit, however, that Patterson should not control in a matter of life and death. In Woodson v. North Carolina, supra at 2992, this Court recognized the qualitative difference between a death sentence and any sentence to confinement, however long, and accordingly insisted on stringent standards of reliability in the capital-sentencing process. Even in its own far less serious context, Mullaney regarded

^{13/} Amicus concedes that the Ohio Supreme Court has refused to treat absence of mitigation as an element of capital murder. State v. Downs, 51 Ohio St.2d 47, ____ N.E.2d ____ (1977) (syllabus 6). But, if due process "...is concerned with substance rather than this kind of formalism," Mullaney v. Wilbur, 421 U.S. at 699, when life is not in the balance, a fortiori such formalism cannot be countenanced when it is.

it as "intolerable," 421 U.S. at 703, to subvert the value of reliability by imposing a sentence of long-term confinement on the defendant "...when the evidence indicates that it is as likely as not that he deserves a significantly lesser sentence." Ibid. Had Ohio allocated to the prosecution the burden of negating mitigating circumstances once the defendant introduced evidence adequate to raise the issue, it is at least strongly arguable that a death sentence would not have been imposed on the facts of the case at bar and in other cases, as well, especially Woods and Sandra Lockett, supra. But, as the Ohio Supreme Court has squarely held, an Ohio defendant can be killed when the evidence indicates that it is as likely as not that he deserves to live, albeit in a prison. State v. Downs, supra. For sheer intolerability, this beggars the concern for reliability voiced in Woodson and Mullaney. Amicus therefore respectfully urges this Court to hold Ohio's procedure unconstitutional and to establish firmly that a death sentence cannot be imposed until the prosecution persuades the sentencer beyond a reasonable doubt that the defendant deserves to die.

IV. OHIO REV. CODE §2929.03(C) VIOLATES THE RIGHT TO TRIAL BY JURY GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS AND IMPOSES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS BY TOTALLY PRECLUDING THE JURY FROM EXPRESSING AN OPINION WHETHER, ON THE FACTS OF A PARTICULAR CASE, AS MEASURED BY CONTEMPORARY STANDARDS OF DECENCY, THE DEFENDANT DESERVES TO LIVE OR DIE.

Prior to Furman v. Georgia, 408 U.S. 238 (1972), the capital-sentencing decision in Ohio was entrusted solely to the jury unless the defendant waived trial by jury on the merits, in which event both trial and sentencing were handled by a three-judge court. Believing that compliance with Furman precluded jury sentencing, see Lehman and Norris, Some Legislative History and Comments on Ohio's New Criminal Code, 23 CLEVE. ST. L.REV. 8, 16-17, 20 (1974), a judgment that was proved wrong by Gregg v. Georgia, 96 S.Ct. 2909 (1976), the Ohio legislature enacted §2929.03(C) which remits the sentencing decision to one or three judges, depending on whether or not guilt was determined by a jury, and bars even advisory participation by the jury.

In the pre-Furman era, jury participation in the capital-sentencing process was so deeply rooted as to be axiomatic. See Woodson v. North Carolina, supra at 2985. Although this Court "has never suggested that jury sentencing is constitutionally required," Proffitt v. Florida, 96 S.Ct. 2960, 2966 (1976), and has opined that judicial sentencing should lead to greater consistency, ibid., it has neither considered nor approved any post-Furman death penalty statute that totally excluded the jury. Even the Florida statute sustained in Proffitt impinged but slightly upon the tradition that only a jury may impose a death sentence. Id. at 2965. By contrast, Ohio's statute bars even advisory participation by the jury, and therefore completely subverts the tradition.

From a Sixth Amendment perspective, the kinds of issues that may arise at an Ohio mitigation hearing are well within the traditional role of juries in criminal cases. Inducement by the victim is comparable to the substantive issue of consent; duress,

coercion and provocation have defensive or reductive counterparts; and mitigating mental condition is analogous to the defense of insanity. In terms of issues, therefore, there is no justification for barring jury participation in the determination of sentence.

Moreover, as appears from our argument relating to burden of proof, if Ohio's law is viewed with a concern for substance rather than formalism, issues of mitigation actually go to the degree of guilt, with mandatory or preclusive consequences on sentence. Consequently, such issues have to be jury triable under the Sixth Amendment. See United States v. Kramer, 289 F.2d 909, 921 (2d Cir. 1961).

From an Eighth Amendment perspective, at least advisory jury participation should be required even if mitigation relates exclusively to sentencing. It is clear that determining the validity of capital-sentencing procedures crucially implicates "contemporary standards of decency." Woodson v. North Carolina, *supra* at 2987. In the Sixth Amendment case of Witherspoon v. Illinois, 391 U.S. 510, 519 n. 15 (1968), this Court, citing the Eighth Amendment decision in Trop v. Dulles, 356 U.S. 86, 101 (1958), observed that

...one of the most important functions any jury can perform...is to maintain a link between contemporary community values and the penal system -- a link without which the determination of punishment could hardly reflect "the evolving standards of decency that mark the progress of a maturing society."

Although that observation was made in the context of a system of uncontrolled jury discretion, it is also vital where discretion is guided. See Gregg v. Georgia, *supra* at 2933. Indeed, as the Florida Supreme Court recently noted in McCaskill v. State, 21 Crim. L. Rptr. 2131 (Fla. April 7, 1977) (reversing a death sentence imposed by the judge after the jury had recommended life),

We also cannot ignore the recommendation of the jury. This Court in reviewing the propriety of the death sentence must weigh heavily the advisory opinion of the sentencing jury....Juries are the conscience of our communities.

In important part, the conscience of the community is forged in the crucible of the jury room when adequately guided jurors of diverse background and experience debate the life-or-death decision. That debate simply cannot be replicated in the mind and heart of a single judge or even a panel of three. Ohio's law does not reflect a legislative judgment to the contrary. As noted above, the only judgment made by the Ohio legislature was that Furman precluded jury participation of any sort. That judgment has already been proved erroneous, and Amicus now respectfully urges this Court to declare it unconstitutional.

V. THE SCOPE OF REVIEW ACCORDED DEATH SENTENCES BY THE OHIO SUPREME COURT IS INADEQUATE UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO INSURE THAT A DEATH SENTENCE IS WARRANTED BY THE FACTS OF A PARTICULAR CASE AND IS PROPORTIONATE TO SENTENCES IMPOSED IN SIMILAR CASES.

If society were convinced that trial judges and jurors made unassailably correct decisions of fact and law, there would be no need for any system of appellate review. Similarly, were we convinced of the invariable rectitude of intermediate appellate courts, a system of further review would be but a costly luxury. That appellate courts exist is therefore the strongest evidence of a deeply held belief that they significantly contribute to the reliability of the process, to the very reliability that is a fundamental concern in determining the constitutionality of a capital-sentencing scheme. See Woodson v. North Carolina, supra at 2992. Close scrutiny of death sentences by a state's highest court -- the only court with state-wide jurisdiction -- is a highly important procedural safeguard against the arbitrary and capricious imposition of the death penalty, Gregg v. Georgia, supra at 2937, for it helps to insure not only that the death penalty is appropriate when measured by the facts of a particular case, but also that it is proportionate to sentences imposed in similar cases. In the preceding sections of this brief, we have argued that Ohio's trial-level process for imposing the death penalty is unreliable from both substantive and procedural standpoints. In the present section, we submit that these profound deficiencies have been compounded by the narrow scope of review accorded death sentences by the Ohio Supreme Court.

Although death-sentence cases are reviewable as a matter of right in Ohio's appellate courts, including the Supreme Court, it was generally believed in the pre-Furman era that no Ohio reviewing court had the authority to set aside a death sentence as excessive or inappropriate. See McGautha v. California, 402 U.S. 183, 195 n.

7 (1971). However, in State v. Bayless, 48 Ohio St.2d at 86, 357 N.E.2d at 1045, the Ohio Supreme Court stated that it would "independently review the aggravating and mitigating circumstances presented by the facts of each case to assure ourselves that capital sentences are fairly imposed by Ohio's trial judges." Amicus regrets to say that the Court has not kept its promise with fidelity to Eighth Amendment values.

The Ohio Supreme Court's notion of fairness apparently does not include an evaluation, such as occurs in Florida, see Proffitt, supra at 2969, of whether the death sentence in a particular case is compatible with sentences imposed in similar cases. In none of the twenty-five cases in which it has sustained the death sentence has it even attempted to compare the case with any other case in which the death sentence was imposed or with any case in which it was averted. Indeed, the Court seems to regard comparison as unnecessary, given the quasi-mandatory nature of Ohio's scheme. See State v. Alberta Osborne, 49 Ohio St.2d 135, 145-6, 359 N.E.2d 78, 86 (1977). The Court's attitude is all the more remarkable in light of the fact that some of its cases have concerned incidents involving joint participants of significantly different blameworthiness. See State v. Bell, supra; State v. Woods, supra; State v. Sandra Lockett, supra.

Nor does the Court's notion of fairness include a willingness to determine whether Ohio's trial judges used correct legal standards in making the life-or-death decision. As discussed earlier, the Ohio Supreme Court has purported to interpret various mitigating factors broadly for the benefit of defendants. These expansive readings, however, could hardly have been anticipated

by the judges who imposed the death sentence, and it is quite likely that they used narrower standards in holding that mitigation had not been proved. Despite this, the Ohio Supreme Court has not remanded a single case for a new sentencing hearing to be conducted pursuant to the newly articulated standards. Rather, with but one exception, the Court has simply reviewed the record as made, without even inquiring whether the standards used by the sentencer were compatible with the standards thereafter announced.^{14/}

Additionally, the Ohio Supreme Court's notion of fairness does not include insistence in all cases on a complete record. In State v. Woods, 48 Ohio St.2d at 134 n. 2, 357 N.E.2d at 1064 n. 2, the Court complained that the record did not contain the presentence report that had been submitted to the trial court. Nevertheless, it proceeded to review the record without it, and affirmed the death sentence. The impropriety of this practice is manifest, Cf. Gardner v. Florida, 97 S.Ct. 1197 (1977), unless Ohio's law is so mandatory that presentence reports are irrelevant.

Finally, and most importantly, the Ohio Supreme Court's notion of fairness excludes close review of the facts. In Proffitt v. Florida, supra at 2966, this Court noted that, under Florida's procedure "the evidence

^{14/} The single exception is State v. Carl Osborne, 50 Ohio St.2d 211, 221, ____ N.E.2d ____, (1977), in which the Court stated that the trial judge had used a correct definition of duress. When the Petition for a Writ of Certiorari is filed in Osborne, see note 9, supra, it should demonstrate that the Ohio Supreme Court misread the record.

of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida." The life-and-death importance of reweighing the evidence is dramatically illustrated by the fact, specifically noted by this Court, id. at 2967, that the Florida Supreme Court had set aside the death sentence in eight of the twenty-one cases it had then reviewed. The Ohio Supreme Court, by contrast, has reviewed twenty-six death sentence cases. It has set aside the conviction and sentence in one for evidentiary error unrelated to the penalty. State v. James Lockett, 48 Ohio St.2d 71, 358 N.E.2d 1077 (1976). In each of the twenty-five remaining cases, however, it has affirmed the death sentence. This result is shocking evidence of "cursory or rubber stamp review," Proffitt v. Florida, supra at 2969, but it is hardly surprising given the narrow standard of review adopted by the Court.

In State v. Edwards, 49 Ohio St.2d at 47, 358 N.E.2d at 1062, the Ohio Supreme Court, relying on a pre-Furman capital case, State v. Cliff, 19 Ohio St.2d 31, 249 N.E.2d 823 (1969), explicitly stated that

in criminal appeals this court will not retry issues of fact [relating to mitigation]. In the circumstances at hand, we confine our consideration to a determination of whether there is sufficient substantial evidence to support the verdict rendered.

This extremely narrow standard of review, as Cliff makes clear, is intended to avoid only the most blatant errors, for it requires that the verdict or sentence be sustained unless no reasonable mind could reach the same conclusion. Whatever the merits of this standard in non-capital cases, surely

it does not suffice in capital cases to guarantee that the death penalty is appropriate when measured by the facts of a particular case, especially when the burden of proving mitigation is on the defendant.

The indiscriminating bite of the Cliff standard is obvious. As mentioned above, some of the Court's cases concern incidents involving several defendants. The case at bar is one; State v. Woods, supra, is another. In each, the participants were blameworthy, but in different degree. Yet each participant was sentenced to death, and the Ohio Supreme Court indiscriminatingly affirmed each sentence. But perhaps the most dramatic case is State v. Sandra Lockett, supra. As revealed by the unreported opinion of the Ohio Court of Appeals for the Ninth District, No. C.A. 7780 (March 3, 1976), at 9-10, the defendant was an accomplice -- the driver of the getaway car -- in what was intended to be merely the robbery of a pawn shop, but became a homicide. The prosecution's principal witness, Al Parker, was the one who pulled the trigger. He was permitted to plead guilty to non-capital murder in exchange for a life sentence. The accomplice, Sandra Lockett, although offered the same plea, refused, insisted on a trial, was convicted of capital murder and sentenced to death. The Ohio Supreme Court affirmed her sentence without even mentioning the life sentence received by Parker.^{15/}

^{15/} The Court did, however, refer to that fact in the case of State v. James Lockett, 49 Ohio St.2d at 72, 358 N.E.2d at 1078. Sandra Lockett's refusal to plead guilty to non-capital murder was not an act of stubborn unrepentance. Indeed, the Ohio Supreme Court split 4-3 on whether she was guilty of any degree of murder.

As the Ohio Supreme Court's own decisions demonstrate, the standard of review it has adopted does not permit it to make the discriminating judgments of comparative blameworthiness that Woodson and the two Roberts cases require. The scope of review accorded capital cases is, therefore, inadequate to insure that a death sentence is warranted by the facts of a particular case and that it is compatible with sentences imposed in similar cases.^{16/}

^{16/} The scope of review is also inadequate to insure that the defendant is guilty of capital murder, apart from mitigation. In State v. Carl Osborne, 50 Ohio St.2d 211, ____ N.E.2d ____ (1977), the capital-murder conviction rested solely on the aggravating specification of killing for hire. In the extensive record of that case there are but two statements regarding killing for hire, neither of which pertains to the defendant. The record is so inadequate that it offends the principle of Thompson v. Louisville, 362 U.S. 199 (1960). Nonetheless, the Ohio Supreme Court sloughed off the whole matter with a cryptic reference to "the totality of the evidence, including that bearing upon the doctrine of complicity...." 50 Ohio St.2d at 223, ____ N.E.2d at _____. See also State v. Miller, 49 Ohio St.2d 198, 361 N.E.2d 419 (1977) in which the conviction rested on fingerprints which, according to the dissenting opinion, could have been left at the scene by the defendant several weeks before the killing. Id. at 205-6, 361 N.E.2d at 424.

The representations above regarding the record in Osborne are based on the fact that Amicus played a similar role in Osborne, and counsel for Amicus read the Osborne record.

CONCLUSION

In its Gregg, Jurek and Proffitt decisions, this Court refused to declare the death penalty unconstitutional under all circumstances. But what it stressed in these cases, and in Woodson and the two Roberts cases as well, leaves no doubt that it will insist on the highest standards of reliability and procedural regularity before it upholds a death-sentence scheme. Superficially viewed, the arguments that we have tendered in this brief are different. Running through all of them, however, is a single question: has Ohio adhered to the highest standards, thus insuring that "death is the appropriate punishment in a specific case"? Woodson v. North Carolina, supra at 2992. Amicus submits that the answer is no.

When the Ohio legislature enacted Ohio's death-sentence scheme, it had but the uncertain guidance of Furman, and it was understandably concerned only to check the discretion that Ohio juries had theretofore exercised without control. The legislature was aware that an alternative to uncontrolled discretion was a mandatory death penalty imposed on all persons convicted of certain crimes regardless of mitigating circumstances. See Ohio Legislative Service Commission Staff Research Report No. 107, Capital Punishment, Legislative Implications of the U.S. Supreme Court Decision in Furman v. Georgia (1972), at 16. But it was advised that a mandatory death penalty, too, might be unconstitutional. Ibid. Consequently, the legislature tried to "split the difference" by specifying some mitigating factors, ignoring most, providing that the death penalty was precluded if any specified factor was proved by a preponderance of the evidence, and mandating the death penalty absent such proof.

In creating Ohio's narrow structure, the legislature failed to recognize that some of the mitigating factors it had specified were inconsistent with aggravating circumstances essential for guilt of capital murder; it failed to distinguish the specified mitigating factors from their defensive or reductive counterparts; and it gave no weight to mitigating matters which this Court, other courts, and other legislatures now require in determining whether, under contemporary standards of decency, death is the appropriate punishment in a given case. Having subverted reliability, the legislature compounded the error by forcing the defendant to prove mitigation, thus increasing the risk of an erroneous decision, of a decision that the death penalty is appropriate when, just as likely, it is not. Then the legislature remitted the entire sentencing decision to the court, totally precluding any input from jurors whose diverse backgrounds and experience are a source of contemporary standards of decency. Finally, the legislature failed to require appellate review adequate to insure that a death sentence is appropriate in a specific case and that it is compatible with sentences imposed in similar cases.

Measured by its primary concern -- controlling discretion -- the legislature was moderately successful. But in terms of what were to become the concerns of this Court, it failed miserably, thus casting the onus on the Ohio Supreme Court.

The Ohio Supreme Court held all cases, awaiting this Court's second-round decisions. But, as applied to Ohio's law, Woodson and Stanislaus Roberts, on the one hand, and Gregg, Proffitt and Jurek, on the other, raised an issue of the profoundest difficulty: how to salvage the legislature's errors without engaging in too much "judicial

legislation."^{17/} Aware of the differences between Ohio's narrow law and the much broader formulations of Georgia, Florida and Texas, State v. Bayless, 48 Ohio St.2d at 86-7 & n. 2, 357 N.E.2d at 1045-6 & n. 2, the Court initially chose to dismiss them as inconsequential. Ibid. Overlooking the fact that the legislature had misread Furman, the Court simply contented itself with the observation that the legislature's task had been "delicate." Id. at 86, 357 N.E.2d at 1046. But the issue would not subside, and in subsequent cases the Court was forced to confront it in all of its difficult ramifications. The separate steps in this effort have already been recounted in part II A of this brief, and need not be detailed here. Yet, three points must be made. First, the Court never even attempted to reconcile Ohio's mitigating factors with the aggravating circumstances essential to guilt of capital murder. Second, the Court's attempt to differentiate the mitigating factors from their defensive or reductive counterparts so deeply implicated a range of integrated issues of substantive criminal law that the case-by-case process became uniquely unwieldy. Third, and most important, the Court's try at giving a modicum of mitigating effect to youth and absence of a prior record -- matters that the legislature had not specified -- foundered on the fact that the already specified mitigating matters precluded imposition of the death penalty.

^{17/} The Court could hardly have been unaware of the issue. Indeed, the issue was squarely called to the Court's attention in a brief filed by Amicus in State v. Carl Osborne, supra, three weeks before the Court rendered its first death-penalty decision in State v. Bayless, supra.

Apparently unwilling to ignore unspecified matters totally, yet equally unwilling to rewrite the statute to give them preclusive effect, the Court awkwardly tried to shoe-horn youth and absence of a prior record into mitigating duress and mental deficiency.

That the effort failed is obvious; Ohio's law is hardly broader in its application than it is on its face. What is less obvious is that the effort was doomed to failure by the intractability of the issues with which the Ohio Supreme Court was confronted. That unhappy burden was thrust on the Court solely by virtue of the legislature's understandable misreading of Furman. That the Court was unable to carry it, that the Court failed to create a reliable death-penalty scheme, as required by Woodson and the two Roberts cases, is also understandable.

Amicus therefore respectfully urges this Court to give the State of Ohio the opportunity to comply with high standards of reliability and procedural regularity, as befits a process with life in the balance, by declaring Ohio's death-penalty scheme unconstitutional.

Respectfully submitted,

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OCT 3 1977

DELOREL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

October Term, 1977
No. 76-6513

WILLIE LEE BELL,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

On Writ of Certiorari to the Supreme Court of Ohio

Brief of Amicus Curiae in Support of Respondent

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Brief of Amicus Curiae in Support of Respondent

Interest of Amicus Curiae

The State of California files this amicus brief pursuant to Rule 42(4) of the Rules of the Supreme Court of the United States. The People of the State of California have a vital interest in one of the questions presented by the petitioner and amicus in his support.¹

¹Amicus herein recognizes that the grant of certiorari in this case was limited to the first question presented in the petition (App. p. 165), *i.e.*, whether the imposition of the sentence of death for the crime of aggravated murder under the laws of the State of Ohio violates the protection against cruel and unusual punishment secured to all persons by the Eighth and Fourteenth Amendments to the Constitution of the United States. (Petn. for Cert. p. 5.) However, an examination of Appendix A to this Amicus Brief will reveal that California's death penalty statute differs from the Ohio procedure in most of the respects brought into question in this matter. As to the arguments directed to the Ohio procedure, except the matter of appellate review, California will rely on the arguments presented in Respondent's Brief.

This question implicates the review procedure provided in the Ohio capital sentencing system.

The alleged vice in the Ohio system in this respect is the "adherence" to the doctrine that the Supreme Court of Ohio will not "retry" the existence of mitigating facts, and does not reweigh the credibility of witnesses. (Petitioner's Brief p. 61.)

The Brief Amicus Curiae of the American Civil Liberties Union of Ohio Foundation, Inc. follows on the same course in Point V, pages 43-49, complaining that

"The scope of review accorded death sentences by the Ohio Supreme Court is inadequate under the Eighth and Fourteenth Amendments to insure that a death sentence is mandated by the facts of the particular case and is *proportionate* to sentences imposed in similar cases" (emphasis added), in effect urging that proportionality review and comparison with other cases, a statutory requirement in Georgia, is constitutionally mandated.

California submits that Petitioner and his Amicus misread the cases decided by this Honorable Court in July, 1976, and we will urge that the meaningful review of which the Court spoke did not require Ohio and the other states of the Union to provide the elaborate "proportionality" review adopted in Georgia by statute.

California has been before this Honorable Court on numerous occasions over the past several years on the issue of the constitutionality of the death penalty and the procedure and occasion for its imposition.

California was before the Court as a party when *Furman* was argued (*Aikens v. California*, No. 68-

5027, reported in 403 U.S. 952). The question presented was stated, "Does the imposition and carrying out of the death penalty in this case constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." However, *Aikens* was mooted by the intervening decision of the California Supreme Court in *People v. Anderson*, 6 Cal. 3d 628, holding that capital punishment was unconstitutional under article I, section 6 of the state Constitution in that it came within the proscription of the "cruel or unusual" clause thereof.

Following the decision in *Anderson* and this Court's decision in *Furman v. Georgia*, 408 U.S. 238, the People of the State of California, in November, 1972, by exercise of the initiative, amended the state Constitution to state that the death penalty provided in the state statutes should not be deemed to be infliction of cruel or unusual punishment within the meaning of any provision of the state Constitution. (The vote was overwhelming, 67 percent of the voters voting in favor of the initiative, 5,386,904 votes to restore the death penalty.) See Appendix A to California's Amicus Brief in *Gregg, et al.*

Pursuant to the People's mandate, the Legislature enacted Senate Bill 450, which became Chapter 719 of the Statutes of 1973, reinstating the death penalty for certain categories of murder and other serious crimes. (See Appendix B, California's Amicus Brief in *Gregg*.)

Following the decisions in *Gregg v. Georgia, et al.*, 428 U.S. 153, *et seq.* holding that capital punishment was not unconstitutional *per se*, the California Supreme Court held that the procedure for imposition of the

death penalty in California's statute did not conform to the requirements set forth in *Gregg*. See *Rockwell v. Superior Court*, 18 Cal. 3d 420.

A new statute to provide for the death penalty (See Appendix A, this Brief), and designated Senate Bill 155 (now Chapter 316, Statutes of 1977), was passed by both houses of the Legislature by a two-thirds vote. The governor's veto was overridden on August 11, 1977, and on the basis of an urgency clause the legislation became effective on that date.

This statute provides for the meaningful appellate review required by the opinions of this Court but it does not contemplate "proportionality" review by the State Supreme Court as is provided in the Georgia statute approved in *Gregg*.

Amicus submits this brief in support of the proposition that the procedure enacted by the Georgia Legislature is not constitutionally mandated and that Ohio and the other states of the Union may provide for adequate constitutional review without requiring the appellate court to "reweigh" the evidence, "retry" the issues or determine the "proportionality" of sentences.

It is submitted that California has adopted a procedure of appellate review in accord with the directions set forth in the plurality and concurring opinions in *Gregg*, *Proffitt*, and *Jurek*. (See Appendix A.)

However, it has been urged that the Georgia statutory scheme is a constitutional mandate. This argument was rejected in the California Legislature, and for good reason! See *People v. Anderson*, *supra*, 6 Cal. 3d 628. The California Supreme Court in *Anderson* held that the death penalty was cruel and/or unusual

punishment under the state Constitution, that it was "impermissibly" cruel and that it was "repudiated" by society. This holding required a constitutional amendment by a People's initiative to make this penal sanction available for the protection of society.² A reweighing of the credibility of witnesses, a retrying of the evidence and a "proportionality" review by a court of such an opinion would render the statute totally ineffective for its purpose and defeat the intent of the People expressed in the initiative.

For the reasons set forth above, the State of California will be affected by a disposition in this case of the question as to the scope of appellate review of death sentences.

Summary of Argument

The Ohio procedure for review in capital cases provides the meaningful review of sentences of death in accord with this Court's holdings and the requirements of the United States Constitution.³

It is not a constitutional imperative that a state legislature, or Congress, require the highest appellate court to participate in the sentencing procedure to the extent of retrying the evidence, judging of the credibility of witnesses or determining "proportionality." It is sufficient that the legislature furnish adequate

²This Honorable Court is well aware of the problem faced by California. See *Gregg*, plurality opinion, page 181, noting the statewide referendum required to negate the ruling of the California court. See also *Roberts v. Louisiana*, *supra* (428 U.S. 325), dissenting opinion of Justice White, page 352, footnote 5.

³The arguments of Petitioner and his Amicus specifically directed to the Ohio appellate review procedure are answered in the Brief of Respondent and will not be repeated herein.

guidelines to the sentencing authority and permit the defense to bring before the trier of fact at the sentencing hearing whatever mitigating circumstances relating to the individual defendant that can be adduced, including the particularized nature of the crime and the particularized characteristics of the defendant.

Appellate review assures that the guidelines are followed, the sentencing authority has access to the evidence relating to the crime and the record and background of the defendant, and that the evidence considered is sufficient to support the verdict rendered. It is submitted that this is the meaningful review which the Constitution requires, that it assures that the decision to return a death penalty is not arrived at in a capricious or arbitrary fashion and that the penalty will not be wantonly and freakishly imposed.

ARGUMENT

Meaningful Review Does Not Require the Appellate Court to Determine Proportionality, Retry the Evidence, or Judge Credibility

Gregg, supra, and the companion cases held that the death penalty is *not* per se cruel and unusual punishment prohibited by the Eighth Amendment to the Constitution of the United States. Earlier cases had not confronted this question directly although many had assumed or asserted its constitutionality. (*Gregg, supra* at 168.) The *Furman* majority, of course, did not resolve this question. The basic concern of *Furman* was the arbitrary and capricious imposition of the death penalty.

" . . . Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. . . ." *Gregg v. Georgia, supra*, 428 U.S. at 188.

It was stated that the " 'Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.' . . . " *Gregg v. Georgia, supra* at 188.

For a statute to meet constitutional requirements, the capital sentencing system must allow the sentencing authority to consider mitigating circumstances. (*Jurek v. Texas*, 428 U.S. 262, 271), *i.e.*, it is necessary that " 'there be taken into account the circumstances of the offense together with the character and propensities of the offender.' " (*Gregg, supra* at 189, quoting

Pennsylvania ex rel. Sullivan v. Ashe, 302 U.S. 51, 55 [1937].)

The statute must ensure that the sentencing authority has adequate guidance to enable it to perform its function. The procedures adopted must enable the jury's attention to be focused on the particularized nature of the crime and the particularized characteristics of the individual defendant.

This Honorable Court said that it did not intend to suggest that only the Georgia procedure would be permissible under *Furman* or that any sentencing system constructed along these general lines would inevitably satisfy the concerns of *Furman*, each distinct system was to be examined on an individual basis. (*Gregg*, *supra* at 195.)

In discussing the Georgia procedure, the plurality opinion said of the sentencing review contained in the statute (page 166, *Gregg v. Georgia*):

"In addition to the conventional appellate process available in all criminal cases, provision is made for special expedited direct review by the Supreme Court of Georgia of the appropriateness of imposing the sentence of death in the particular case. . . ." (Emphasis added.)

The opinion of the plurality in *Gregg*, *supra* (p. 204), said, "Finally, the Georgia statute has an *additional* provision designed to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants. . . ." (emphasis added), and a discussion of the statutory provisions for review and the practice in Georgia followed. The plurality opinion concluded with a summary of the Georgia sentencing

system and with a reference to the review provisions as follows (p. 207):

". . . In addition, the review function of the Supreme Court of Georgia affords *additional* assurance that the concerns that prompted our decision in *Furman* are not present to any significant degree in the Georgia procedure applied here." (Emphasis added.)

The Court did *not* state that the meaningful appellate review required of a constitutionally adequate statute could not be available through the conventional appellate process which secures compliance with the evidentiary and procedural demands of *Furman* and *Gregg*, *et al.*

The Texas procedure for capital sentencing, upheld in *Jurek* (428 U.S. 262), does not contemplate the retrying on appeal of the evidence presented at the penalty phase nor does it permit a "tinkering" on appeal with the judgment and sentence rendered. The test to be applied is whether proper evidence was presented to the jury to enable it to make its decision on the three questions required to be answered in the affirmative at the penalty phase and the legal sufficiency of such evidence to support the conclusions drawn.

See

Jurek v. State, 522 S.W.2d 934 (*affd.* *Jurek v. Texas*, 428 U.S. 262, 277);

Gholson v. State, 542 S.W.2d 395, 398 (*cert. denied*, June 20, 1977, 97 S.Ct. 2960);

Moore v. State, 542 S.W.2d 664 at 676 (*cert. denied*, May 31, 1977, 97 S.Ct. 2666);

Boulware v. State, 542 S.W.2d 677 (cert. denied, April 4, 1977, 97 S.Ct. 1610-11);

White v. State, 543 S.W.2d 104 (cert. denied, April 25, 1977, 97 S.Ct. 1689).

In *Moore*, *supra* at 676, the Texas Court of Criminal Appeals specifically held that the testimony offered at the penalty stage, as well as at the guilt stage, was *sufficient* to sustain the jury's answer of "yes" to the second issue submitted at the penalty stage of the trial.

See also

Collins v. State, 548 S.W.2d 368 (cert. denied, April 4, 1977, 97 S.Ct. 1611).

In *Jurek*, *supra* at 273, this Court noted that in the case of *Smith v. State*, No. 49,809, the appellate court examined the *sufficiency* of the evidence to see if the "yes" answer to question 2 should be sustained. See *Smith v. State*, 540 S.W.2d 693, 697 (on appellant's motion for rehearing).

As the plurality opinion in *Jurek*, *supra* said at 276:

"We conclude that Texas' capital-sentencing procedures, like those of Georgia and Florida, do not violate the Eighth and Fourteenth Amendments. By narrowing its definition of capital murder, Texas has essentially said that there must be at least one statutory aggravating circumstance in a first-degree murder case before a death sentence may even be considered. By authorizing the defense to bring before the jury at the separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced, Texas has ensured that the sentencing

jury will have adequate guidance to enable it to perform its sentencing function. *By providing prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law.* Because this system serves to assure that sentences of death will not be 'wantonly' or 'freakishly' imposed it does not violate the Constitution." (Emphasis added.) *Jurek v. Texas*, 428 U.S. at 276.

Texas cases thus reflect that the appellate review contemplated was of the sufficiency of the evidence to support the finding of the sentencing authority of the questions required to be affirmatively answered in the penalty hearing phase. *E.g.*, see *Moore v. State*, *supra* (542 S.W.2d 664, 676).

In Florida, the statute does not provide for a proportionality review and although language used in the leading case (*State v. Dixon*, 283 So.2d 1) might indicate that such review is undertaken, an examination of the majority of the cases reversed by the Florida Supreme Court will reveal that in those cases the trial judge had refused to follow the jury's recommendation of life and had imposed the death sentence.

The rule developed in Florida is that the recommendation of the advisory jury should weigh heavily in the determination of the sentence.

Lamadline v. State, 303 So.2d 17;

McCaskill v. State, 344 So.2d 1276 at 1280.

In *Tedder v. State*, 322 So.2d 908, the Florida Supreme Court said that to sustain a death sentence where the jury has recommended life the facts sug-

gesting a sentence of death must be so clear and convincing that no reasonable person could disagree.

Dobbert v. State, 328 So.2d 433 is an example of an affirmance by the Florida Supreme Court of a death sentence imposed by a trial judge after a jury had recommended a life sentence. The State Supreme Court found that, considering the mitigating and aggravating circumstances and after a careful review of the entire record, the trial judge properly imposed the death penalty for the murder conviction. (P. 441.)

In affirming the judgment and rejecting an *ex post facto* claim, this Honorable Court in *Dobbert v. Florida*, U.S., 97 S.Ct. 2290, discussed the review accorded by the Florida Supreme Court in this situation and noted the new procedure used to review a trial court's rejection of a jury's recommendation of life, stating the *Tedder* rule as follows (at p. 2299):

"'In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be *so clear and convincing that virtually no reasonable person could differ.*'" (Emphasis in opinion of the Court.)

This Court said that this review was by no means perfunctory and that this statute afforded significantly more safeguards than the old Florida statute. In sustaining the affirmance of the judgment imposing death after a jury recommendation of life, this Court noted that there were obvious and substantial aggravating factors in support of the trial judge's determination.

In *Proffitt* (428 U.S. 242), the plurality acknowledged that it was true that the Florida Supreme Court

had not chosen to formulate a rigid objective test as its standard of review for all cases. However, this Court said that it does not follow that the appellate review process was ineffective or arbitrary. (*Proffitt v. Florida*, 428 U.S. at 242.) This Court concluded (at pages 259-60),

"Florida, like Georgia, has responded to Furman by enacting legislation that passes constitutional muster. That legislation provides that after a person is convicted of first-degree murder, there shall be an informed, focused, guided, and objective inquiry into the question whether he should be sentenced to death. If a death sentence is imposed, the sentencing authority articulates in writing the statutory reasons that led to its decision. Those reasons, and the evidence supporting them, are conscientiously reviewed by a court which, because of its statewide jurisdiction, can assure consistency, fairness, and rationality in the evenhanded operation of the state law. As in Georgia, this system serves to assure that sentences of death will not be 'wantonly' or 'freakishly' imposed. See *Furman v. Georgia*, 408 U.S., at 310 (Stewart, J. concurring). Accordingly, the judgment before us is affirmed."

See *Proffitt v. State*, 315 So.2d 461, 466-67; and see *Cooper v. State*, 336 So.2d 1133 (cert. denied, May 16, 1977, 97 S.Ct. 2200), in which the Florida Supreme Court affirmed a judgment where it found that the trial judge, in imposing the death penalty after a jury had so advised, had considered proper evidence in concluding that there were no mitigating circumstances and so there was no basis to reverse his conclusions.

In *Gardner v. Florida*, U.S., 97 S.Ct. 1197, this Court said that in order for the state to administer its sentencing procedures with an even hand, it is important that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed, *i.e.*, that review of a death sentence imposes a duty to consider the total record. It is significant that rather than remanding the case to the Florida Supreme Court for disposition, the matter was remanded with directions to order further proceedings at the trial court level where the trial judge had refused to follow the advisory verdict of the jury and had imposed a death sentence, partially on a pre-sentence report, portions of which were not disclosed to defense counsel.

Appellate review of sentences has been the source of debate over the years. However, the various states should be permitted to experiment in this area and to make their own decision to adopt such procedure, wholly or partially, to meet the needs of the particular jurisdiction.

See Standards Relating to Appellate Review of Sentences, ABA Project on Standards for Criminal Justice; 32 F.R.D. 249, 257.

The legislatures of the various states may choose not to have the evidence presented to the sentencing authorities "reweighed" by a judicial body that has not heard the evidence, or permit the credibility of witnesses to be "judged" by judges who have not heard them, or permit a judicial body that has already decided that the punishment imposed is "impermissible" and "repudiated" to determine "proportionality."

Gregg and *Furman* require that decisions to impose the death penalty are not made capriciously and arbi-

trarily. In order to avoid the wanton and freakish verdicts decreeing this punishment this Court required that the body charged with the determination of the sentence be provided with guidance and afforded access to information to be considered in arriving at the sentence, including the circumstances of the crime and the background of the defendant.

Meaningful review is needed to assure that the guidance is given and the evidence crucial in determining whether the defendant will die or live is presented to the jury. Where the sentencing authority is required to specify the factors relied on meaningful review is available to assure that no arbitrariness or capriciousness exists. This review should be prompt, before a body with statewide jurisdiction, and, as this Court said this term, on a complete record.

The Constitution does *not* require that the state provide "proportionality" review in its highest court nor that that body "tinker" with the sentence.

Conclusion

It is submitted that Ohio affords the meaningful appellate review in capital cases in accord with this Court's opinions and the Constitution.

Respectfully submitted,

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of California,*

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APPENDIX A

Senate Bill No. 155

CHAPTER 316

An act to amend Section 1672 of the Military and Veterans Code, to amend Sections 37, 128, 209, 219, 1018, 1050, 1103, 1105, 4500, and 12310 of, to repeal Sections 190, 190.1, 190.2, and 190.3 of, and to add Sections 190, 190.1, 190.2, 190.3, 190.4, 190.5, and 190.6 to, the Penal Code, relating to punishment for crimes, and declaring the urgency thereof, to take effect immediately.

[Passed over Governor's veto August 11, 1977.]

Filed with Secretary of State August 11, 1977.]

LEGISLATIVE COUNSEL'S DIGEST

SB 155, Deukmejian. Death penalty.

Existing law provides for the imposition of the death penalty under procedures which have been invalidated by court decision because they lack provision for consideration of mitigating circumstances.

This bill would make such a mitigating circumstances provision in the law, as to certain crimes formerly subject only to the death penalty, and would impose life imprisonment without parole rather than death or life imprisonment with parole in other cases.

This bill would also define the proof necessary to prove murder involving the infliction of torture to require proof of intent to inflict extreme and prolonged pain, and would define the proof necessary to prove that the defendant aided or committed an act causing death to require proof that the defendant's conduct was an assault or battery or involved an order, initiation, or coercion of the killing.

The bill would provide that certain of its provisions would become operative only until the operative date of A.B. 513, if later than the operative date of this bill.

The bill would take effect immediately as an urgency statute.

The people of the State of California do enact as follows:

SECTION 1. Section 1672 of the Military and Veterans Code is amended to read:

1672. Any person who is guilty of violating Section 1670 or 1671 is punishable as follows:

(a) If his act or failure to act causes the death of any person, he is punishable by death or imprisonment in the state prison for life without possibility of parole. The penalty shall be determined pursuant to the provisions of Sections 190.3 and 190.4 of the Penal Code. If the act or failure to act causes great bodily injury to any person, a person violating this section is punishable by life imprisonment without possibility of parole.

(b) If his act or failure to act does not cause the death of, or great bodily injury to, any person, he is punishable by imprisonment in the state prison for not more than 20 years, or a fine of not more than ten thousand dollars (\$10,000) or both. However, if such person so acts or so fails to act with the intent to hinder, delay, or interfere with the preparation of the United States or of any state for defense or for war, or with the prosecution of war by the United States, or with the rendering of assistance by the United States to any other nation in connection with that nation's defense, the minimum punishment shall be

imprisonment in the state prison for not less than one year, and the maximum punishment shall be imprisonment in the state prison for not more than 20 years, or by a fine of not more than ten thousand dollars (\$10,000), or both.

SEC. 2. Section 37 of the Penal Code is amended to read:

37. Treason against this state consists only in levying war against it, adhering to its enemies, or giving them aid and comfort, and can be committed only by persons owing allegiance to the state. The punishment of treason shall be death or life imprisonment without possibility of parole. The penalty shall be determined pursuant to Sections 190.3 and 190.4.

SEC. 3. Section 128 of the Penal Code is amended to read:

128. Every person who, by willful perjury or subornation of perjury procures the conviction and execution of any innocent person, is punishable by death or life imprisonment without possibility of parole. The penalty shall be determined pursuant to Sections 190.3 and 190.4.

SEC. 4. Section 190 of the Penal Code is repealed.

SEC. 5. Section 190 is added to the Penal Code, to read:

190. Every person guilty of murder in the first degree shall suffer death, confinement in state prison for life without possibility of parole, or confinement in state prison for life. The penalty to be applied shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5. Every person guilty of murder in the second degree is punishable by im-

prisonment in the state prison for five, six, or seven years.

SEC. 6. Section 190.1 of the Penal Code is repealed.

SEC. 7. Section 190.1 is added to the Penal Code, to read:

190.1. A case in which the death penalty may be imposed pursuant to this chapter shall be tried in separate phases as follows:

(a) The defendant's guilt shall first be determined. If the trier of fact finds the defendant guilty of first degree murder, it shall at the same time determine the truth of all special circumstances charged as enumerated in Section 190.2, except for a special circumstance charged pursuant to paragraph (5) of subdivision (c) of Section 190.2 where it is alleged that the defendant had been convicted in a prior proceeding of the offense of murder of the first or second degree.

(b) If the defendant is found guilty of first degree murder and one of the special circumstances is charged pursuant to paragraph (5) of subdivision (c) of Section 190.2 which charges that the defendant had been convicted in a prior proceeding of the offense of murder of the first or second degree, there shall thereupon be further proceedings on the question of the truth of such special circumstance.

(c) If the defendant is found guilty of first degree murder and one or more special circumstances as enumerated in Section 190.2 has been charged and found to be true, his sanity on any plea of not guilty by reason of insanity under Section 1026 shall be determined as provided in Section 190.4. If he is found to be sane, there shall thereupon be further proceedings on the question of the penalty to be imposed. Such

proceedings shall be conducted in accordance with the provisions of Sections 190.3 and 190.4.

SEC. 8. Section 190.2 of the Penal Code is repealed.

SEC. 9. Section 190.2 is added to the Penal Code, to read:

190.2. The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in the state prison for life without possibility of parole in any case in which one or more of the following special circumstances has been charged and specially found, in a proceeding under Section 190.4, to be true:

(a) The murder was intentional and was carried out pursuant to agreement by the person who committed the murder to accept a valuable consideration for the act of murder from any person other than the victim;

(b) The defendant, with the intent to cause death, physically aided or committed such act or acts causing death, and the murder was willful, deliberate, and premeditated, and was perpetrated by means of a destructive device or explosive;

(c) The defendant was personally present during the commission of the act or acts causing death, and with intent to cause death physically aided or committed such act or acts causing death and any of the following additional circumstances exists:

(1) The victim is a peace officer as defined in Section 830.1, subdivision (a) or (b) of Section 830.2, subdivision (a) or (b) of Section 830.3, or subdivision (b) of Section 830.5, who, while engaged in the performance of his duty was intentionally killed, and the defendant knew or reasonably should have known that

such victim was a peace officer engaged in the performance of his duties.

(2) The murder was willful, deliberate, and premeditated; the victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding; and the killing was not committed during the commission or attempted commission of the crime to which he was a witness.

(3) The murder was willful, deliberate, and premeditated and was committed during the commission or attempted commission of any of the following crimes:

(i) Robbery in violation of Section 211;

(ii) Kidnapping in violation of Section 207 or 209. Brief movements of a victim which are merely incidental to the commission of another offense and which do not substantially increase the victim's risk of harm over that necessarily inherent in the other offense do not constitute a violation of Section 209 within the meaning of this paragraph.

(iii) Rape by force or violence in violation of subdivision (2) of Section 261; or by threat of great and immediate bodily harm in violation of subdivision (3) of Section 261;

(iv) The performance of a lewd or lascivious act upon the person of a child under the age of 14 years in violation of Section 288;

(v) Burglary in violation of subdivision (1) of Section 460 of an inhabited dwelling house with an intent to commit grand or petit larceny or rape.

(4) The murder was willful deliberate, and premeditated, and involved the infliction of torture. For purposes of this section, torture requires proof of an intent to inflict extreme and prolonged pain.

(5) The defendant has in this proceeding been convicted of more than one offense of murder of the first or second degree, or has been convicted in a prior proceeding of the offense of murder of the first or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall be deemed to be murder in the first or second degree.

(d) For the purposes of subdivision (c), the defendant shall be deemed to have physically aided in the act or acts causing death only if it is proved beyond a reasonable doubt that his conduct constitutes an assault or a battery upon the victim or if by word or conduct he orders, initiates, or coerces the actual killing of the victim.

SEC. 10. Section 190.3 of the Penal Code is repealed.

SEC. 11. Section 190.3 is added to the Penal Code, to read:

190.3. If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true, or if the defendant may be subject to the death penalty after having been found guilty of violating subdivision (a) of Section 1672 of the Military and Veterans Code, or Section 37, 128, 219 or 4500 of this code, the trier of fact shall determine whether the penalty shall be death or life imprisonment without possibility of parole. In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence, including, but not limited to, the nature and circumstances of the present offense,

the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the expressed or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.

However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the expressed or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction.

However, in no event shall evidence of prior criminal activity be admitted for an offense in which the defendant was prosecuted and was acquitted. The restriction on the use of this evidence is intended to apply only to proceedings conducted pursuant to this section and is not intended to affect statutory or decisional law allowing such evidence to be used in other proceedings.

Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time, as determined by the court, prior to the trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation.

In determining the penalty the trier of fact shall take into account any of the following factors if relevant:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and

the existence of any special circumstances found to be true pursuant to Section 190.1.

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.

(c) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(d) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(e) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(f) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

(g) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or the effects of intoxication.

(h) The age of the defendant at the time of the crime.

(i) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(j) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

After having heard and received all of the evidence, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall determine whether the penalty shall be death or life imprisonment without the possibility of parole.

SEC. 12. Section 190.4 is added to the Penal Code, to read:

190.4. (a) Whenever special circumstances as enumerated in Section 190.2 are alleged and the trier of fact finds the defendant guilty of first degree murder, the trier of fact shall also make a special finding on the truth of each alleged special circumstance. The determination of the truth of any or all of the special circumstances shall be made by the trier of fact on the evidence presented at the trial or at the hearing held pursuant to subdivision (b) of Section 190.1.

In case of a reasonable doubt as to whether a special circumstance is true, the defendant is entitled to a finding that it is not true. The trier of fact shall make a special finding that each special circumstance charged is either true or not true. Wherever a special circumstance requires proof of the commission or attempted commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of the crime.

If the defendant was convicted by the court sitting without a jury, the trier of fact shall be a jury unless a jury is waived by the defendant and by the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty the trier of fact shall be a jury unless a jury is waived by the defendant and by the people.

If the trier of fact finds that any one or more of the special circumstances enumerated in Section 190.2 as charged is true, there shall be a separate penalty hearing, and neither the finding that any of the remaining special circumstances charged is not true, nor if the trier of fact is a jury, the inability of the jury to agree on the issue of the truth or untruth of any of the remaining special circumstances charged, shall prevent the holding of the separate penalty hearing.

In any case in which the defendant has been found guilty by a jury, and the jury has been unable to reach a unanimous verdict that one or more of the special circumstances charged are true, and does not reach a unanimous verdict that all the special circumstances charged are not true, the court shall dismiss the jury and shall order a new jury impaneled to try the issues, but the issue of guilt shall not be tried by such jury, nor shall such jury retry the issue of the truth of any of the special circumstances which were found by a unanimous verdict of the previous jury to be untrue. If such new jury is unable to reach the unanimous verdict that one or more of the special circumstances it is trying are true, the court shall dismiss the jury and impose a punishment of confinement in state prison for life.

(b) If defendant was convicted by the court sitting without a jury, the trier of fact at the penalty hearing shall be a jury unless a jury is waived by the defendant and the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived by the defendant and the people.

If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and impose a punishment of confinement in state prison for life without possibility of parole.

(c) If the trier of fact which convicted the defendant of a crime for which he may be subjected to the death penalty was a jury, the same jury shall consider any plea of not guilty by reason of insanity pursuant to Section 1026, the truth of any special circumstances which may be alleged, and the penalty to be applied, unless for good cause shown the court discharges that jury in which case a new jury shall be drawn. The court shall state facts in support of the finding of good cause upon the record and cause them to be entered into the minutes.

(d) In any case in which the defendant may be subjected to the death penalty, evidence presented at any prior phase of the trial, including any proceeding upon a plea of not guilty by reason of insanity pursuant to Section 1026, shall be considered at any subsequent phase of the trial, if the trier of fact of the prior phase is the same trier of fact at the subsequent phase.

(e) In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to subdivision (7) of Section 1181. In ruling on the application the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make an independent determination as to whether the weight of the evidence supports

the jury's findings and verdicts. He shall state on the record the reason for his findings.

The judge shall set forth the reasons for his ruling on the application and direct that they be entered on the Clerk's minutes.

The denial of the modification of a death penalty verdict pursuant to subdivision (7) of Section 1181 shall be reviewed on the defendant's automatic appeal pursuant to subdivision (b) of Section 1239. The granting of the application shall be reviewed on the peoples appeal pursuant to paragraph (6) of subdivision (a) of Section 1238.

The proceedings provided for in this subdivision are in addition to any other proceedings on a defendant's application for a new trial.

SEC. 13. Section 190.5 is added to the Penal Code, to read:

190.5. (a) Notwithstanding any other provision of law, the death penalty shall not be imposed upon any person who is under the age of 18 years at the time of commission of the crime. The burden of proof as to the age of such person shall be upon the defendant.

(b) Except when the trier of fact finds that a murder was committed pursuant to an agreement as defined in subdivision (a) of Section 190.2, or when a person is convicted of a violation of subdivision (a) of Section 1672 of the Military and Veterans Code, or Section 37, 128, 4500, or subdivision (b) of Section 190.2 of this code, the death penalty shall not be imposed upon any person who was a principal in the commission of a capital offense unless he was personally present during the commission of the act or acts causing death,

and intentionally physically aided or committed such act or acts causing death.

(c) For the purposes of subdivision (b), the defendant shall be deemed to have physically aided in the act or acts causing death only if it is proved beyond a reasonable doubt that his conduct constitutes an assault or a battery upon the victim or if by word or conduct he orders, initiates, or coerces the actual killing of the victim.

SEC. 14. Section 190.6 is added to the Penal Code, to read:

190.6. The Legislature finds that the imposition of sentence in all capital cases should be expeditiously carried out.

Therefore, in all cases in which a sentence of death has been imposed, the appeal to the State Supreme Court must be decided and an opinion reaching the merits must be filed within 150 days of certification of the entire record by the sentencing court. In any case in which this time requirement is not met, the Chief Justice of the Supreme Court shall state on the record the extraordinary and compelling circumstances causing the delay and the facts supporting these circumstances. A failure to comply with the time requirements of this section shall not be grounds for precluding the ultimate imposition of the death penalty.

SEC. 15. Section 209 of the Penal Code is amended to read:

209. (a) Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extor-

tion or to exact from relatives or friends of such person any money or valuable thing, or any person who aids or abets any such act, is guilty of a felony and upon conviction thereof shall be punished by imprisonment in the state prison for life without possibility of parole in cases in which any person subjected to any such act suffers death or bodily harm, or shall be punished by imprisonment in the state prison for life with the possibility of parole in cases where no such person suffers death or bodily harm.

(b) Any person who kidnaps or carries away any individual to commit robbery shall be punished by imprisonment in the state prison for life with possibility of parole.

SEC. 16. Section 219 of the Penal Code is amended to read:

219. Every person who unlawfully throws out a switch, removes a rail, or places any obstruction on any railroad with the intention of derailing any passenger, freight or other train, car or engine and thus derails the same, or who unlawfully places any dynamite or other explosive material or any other obstruction upon or near the track of any railroad with the intention of blowing up or derailing any such train, car or engine and thus blows up or derails the same, or who unlawfully sets fire to any railroad bridge or trestle over which any such train, car or engine must pass with the intention of wrecking such train, car or engine, and thus wrecks the same, is guilty of a felony and punishable with death or imprisonment in the state prison for life without possibility of parole in cases where any person suffers death as a proximate result thereof, or imprisonment in the state prison for

life with the possibility of parole, in cases where no person suffers death as a proximate result thereof. The penalty shall be determined pursuant to Sections 190.3 and 190.4.

SEC. 17. Section 1018 of the Penal Code is amended to read:

1018. Unless otherwise provided by law every plea must be entered or withdrawn by the defendant himself in open court. No plea of guilty of a felony for which the maximum punishment is death, or life imprisonment without the possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall any such plea be received without the consent of the defendant's counsel. No plea of guilty of a felony for which the maximum punishment is not death or life imprisonment without the possibility of parole shall be accepted from any defendant who does not appear with counsel unless the court shall first fully inform him of his right to counsel and unless the court shall find that the defendant understands his right to counsel and freely waives it and then, only if the defendant has expressly stated in open court, to the court, that he does not wish to be represented by counsel. On application of the defendant at any time before judgment the court may, and in case of a defendant who appeared without counsel at the time of the plea the court must, for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted. Upon indictment or information against a corporation a plea of guilty may be put in by counsel. This section shall be liberally construed to effect these objects and to promote justice.

SEC. 18. Section 1050 of the Penal Code is amended to read:

1050. The welfare of the people of the State of California requires that all proceedings in criminal cases shall be set for trial and heard and determined at the earliest possible time. To this end the Legislature finds that the criminal courts are becoming increasingly congested with resulting adverse consequences to the welfare of the people and the defendant. It is therefore recognized that the people and the defendant have reciprocal rights and interests in a speedy trial or other disposition, and to that end shall be the duty of all courts and judicial officers and of all counsel, both the prosecution and the defense, to expedite such proceedings to the greatest degree that is consistent with the ends of justice. In accordance with this policy, criminal cases shall be given precedence over, and set for trial and heard without regard to the pendency of, any civil matters or proceedings.

To continue any hearing in a criminal proceeding, including the trial, a written notice must be filed within two court days of the hearing sought to be continued, together with affidavits or declarations detailing specific facts showing that a continuance is necessary, unless the court for good cause entertains an oral motion for continuance. Continuances shall be granted only upon a showing of good cause. Neither a stipulation between counsel nor the convenience of the parties is in and of itself a good cause. Provided, that upon a showing that the attorney of record at the time of the defendant's first appearance in the superior court is a Member of the Legislature of this State and that the Legislature is in session or that a legislative interim committee of which the attorney is a duly appointed member is meeting or is to meet within the next seven days, the defendant shall be entitled

to a reasonable continuance not to exceed 30 days. A continuance shall be granted only for that period of time shown to be necessary by the evidence considered at the hearing on the motion. Whenever any continuance is granted, the facts proved which require the continuance shall be entered upon the minutes of the court or, in a justice court, upon the docket. Whenever it shall appear that any court may be required, because of the condition of its calendar, to dismiss an action pursuant to Section 1382 of this code, the court must immediately notify the chairman of the Judicial Council.

SEC. 19. Section 1103 of the Penal Code is amended to read:

1103. Upon a trial for treason, the defendant cannot be convicted unless upon the testimony of two witnesses to the same overt act, or upon confession in open court; nor, except as provided in Sections 190.3 and 190.4, can evidence be admitted of an overt act not expressly charged in the indictment or information; nor can the defendant be convicted unless one or more overt acts be expressly alleged therein.

SEC. 20. Section 1105 of the Penal Code is amended to read:

1105. (a) Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable.

(b) Nothing in this section shall apply to or affect any proceeding under Section 190.3 or 190.4.

SEC. 21. Section 4500 of the Penal Code is amended to read:

4500. Every person undergoing a life sentence in a state prison of this state, who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury is punishable with death or life imprisonment without possibility of parole. The penalty shall be determined pursuant to the provisions of Sections 190.3 and 190.4; however, in cases in which the person subjected to such assault does not die within a year and a day after such assault as a proximate result thereof, the punishment shall be imprisonment in the state prison for life without the possibility of parole for nine years.

For the purpose of computing the days elapsed between the commission of the assault and the death of the person assaulted, the whole of the day on which the assault was committed shall be counted as the first day.

Nothing in this section shall be construed to prohibit the application of this section when the assault was committed outside the walls of any prison if the person committing the assault was undergoing a life sentence in a state prison at the time of the commission of the assault and was not on parole.

SEC. 22. Section 12310 of the Penal Code is amended to read:

12310. (a) Every person who willfully and maliciously explodes or ignites any destructive device or any explosive which causes the death of any person is guilty of a felony, and shall be punished by imprisonment in the state prison for life without the possibility of parole.

(b) Every person who willfully and maliciously explodes or ignites any destructive device or any explosive which causes mayhem or great bodily injury to any person is guilty of a felony, and shall be punished by imprisonment in the state prison for life.

SEC. 23. If any word, phrase, clause, or sentence in any section amended or added by this act, or any section or provision of this act, or application thereof to any person or circumstance, is held invalid, such invalidity shall not affect any other word, phrase, clause, or sentence in any section amended or added by this act, or any other section, provisions or application of this act, which can be given effect without the invalid word, phrase, clause, sentence, section, provision or application and to this end the provisions of this act are declared to be severable.

SEC. 24. If any word, phrase, clause, or sentence in any section amended or added by this act, or any section or provision of this act, or application thereof to any person or circumstance, is held invalid, and as a result thereof, a defendant who has been sentenced to death under the provisions of this act will instead be sentenced to life imprisonment, such life imprisonment shall be without possibility of parole. The Legislature finds and declares that those persons convicted of first degree murder and sentenced to death are deserving and subject to society's ultimate condemnation and should, therefore, not be eligible for parole which is reserved for crimes of lesser magnitude.

If any word, phrase, clause, or sentence in any section amended or added by this act, or any section or provision of this act, or application thereof to any person or circumstance is held invalid, and as a result

thereof, a defendant who has been sentenced to life imprisonment without the possibility of parole under the provisions of this act will instead be sentenced to life imprisonment with the possibility of parole.

SEC. 25. If this bill and Assembly Bill 513 are both chaptered, and both amend Section 1050 of the Penal Code, Section 18 of this act shall become operative only if this bill is chaptered and becomes operative before Assembly Bill 513, and in such event Section 18 of this act shall remain operative only until the operative date of Assembly Bill 513.

SEC. 26. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

The California Supreme Court has declared the existing death penalty law unconstitutional. This act remedies the constitutional infirmities found to be in existing law, and must take effect immediately in order to guarantee the public the protection inherent in an operative death penalty law.

Senate Bill No. 155

This bill having been returned by the Governor with his objections thereto, and, after reconsideration, having passed both Houses by the constitutional majority, has become a law this 11th day of August, 1977.

/s/ James R. Mills
Acting President of the Senate

/s/ Leo T. McCarthy
Speaker of the Assembly

Filed: In the office of the Secretary of State of
the State of California.

AUG. 11 1977.

At 5:22 o'clock p.m.

MARCH FONG EU, Secretary of State

By /s/ Irene Devejian
Deputy Secretary of State